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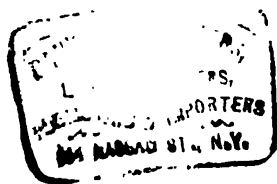
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# LOWER-CANADA REPORTS.

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2800

## DÉCISIONS DES TRIBUNAUX

DU

BAS-CANADA.

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REDACTEURS : MM. LELIEVRE ET ANGERS.

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COLLABORATEURS A MONTREAL : MM. BEAUDRY ET ROBERTSON.

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**VOLUME VIII.**  
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# TABLE

OF

## CASES REPORTED.

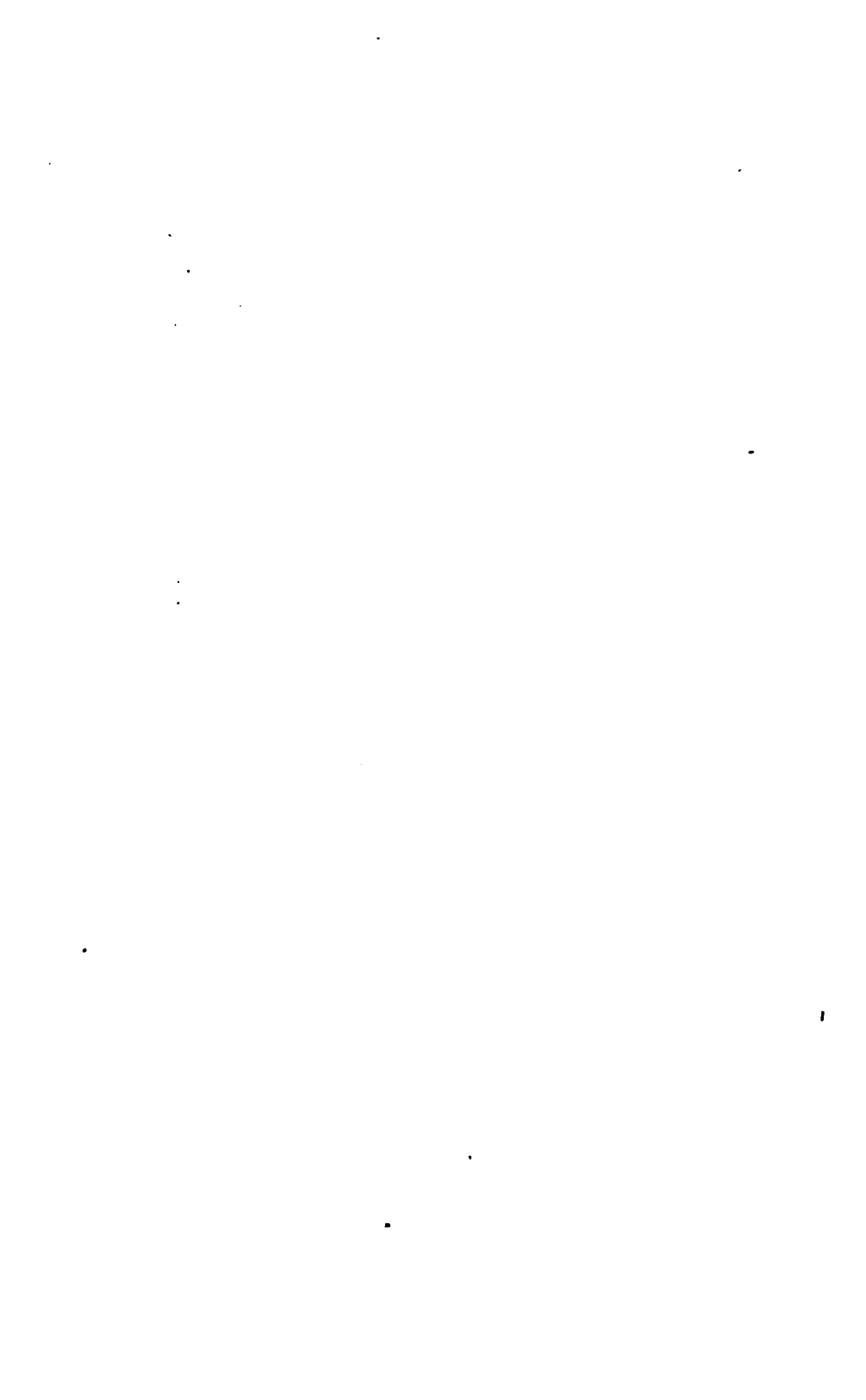
A		Page.	D		Page.
Allsopp, Gallagher <i>and</i>	156		Danaïs, Huot <i>and</i>	235	
B			Delisle, Lalouette dit Lebeau	174	
Bacquet, Rouleau <i>vs.</i>	154		<i>and</i>	501	
Barber <i>vs.</i> O'Hara,	216		Dinning, Douglas <i>and</i>	501	
Beaudry <i>and</i> The Mayor, Aldermen and Citizens of Montréal,	104		Dorion, Foster <i>vs.</i>	152	
Bégin <i>vs.</i> Bell,	138		Douglas <i>and</i> Dinning,	501	
Bélanger <i>vs.</i> The Mayor, Aldermen and Citizens of Montréal,	228		Diaper, The Prince Edward,	293	
Beliveau, Bernier <i>vs.</i>	297		Dubeau <i>and</i> Dubeau,	217	
Bell, Bégin <i>vs.</i>	138		Dubois, Hall <i>and</i>	341	
Bernier <i>vs.</i> Beliveau,	297		Dubois, Quintin dit, <i>and</i> Girard,	317	
Bernier <i>vs.</i> Vachon,	286		Dugal, Romain <i>vs.</i>	209	
Berthelet <i>and</i> Guy,	299		Dunkerly <i>vs.</i> McCarty,	182	
Berthelet <i>and</i> Guy,	303		E		
Bisset, Stevenson <i>vs.</i>	191		Eaton, Stuart <i>vs.</i>	113	
Blais <i>and</i> Simoneau,	356		Elliot, The Winscales,	350	
Blanchet, Guay <i>and</i>	181		F		
Bourrassa <i>vs.</i> Haws,	135		Ferguson, Robertson <i>vs.</i>	239	
British Tar, The, Charleson,	272		Foster <i>vs.</i> Dorion,	182	
Burroughs <i>and</i> Molson,	494		Fradet <i>vs.</i> Labrecque,	218	
C			Franklin County Bank, Larocque <i>and</i>	308	
Caron, Leclerc <i>vs.</i>	287		Fraser <i>and</i> Roche,	208	
Casgrain, Garon <i>and</i>	397		Fraser <i>vs.</i> Poulin,	349	
Chabot, Noel <i>vs.</i>	211		Frelich <i>vs.</i> Seymour,	256	
Chapman <i>vs.</i> Clark,	147		G		
Chapman <i>vs.</i> Masson,	225		Gallagher <i>and</i> Allsopp,	156	
Charleson, The British Tar,	272		Garon <i>and</i> Casgrain,	397	
Charpentier, Platt <i>and</i>	481		Gigon <i>vs.</i> Hütte,	271	
Clark, Chapman <i>vs.</i>	147		Gildersleeve, Kerr <i>vs.</i>	266	
Clément dit Labonté, Naud dit Labrie <i>vs.</i>	140		Girard <i>and</i> Quintin dit Dubois,	317	
Collins <i>vs.</i> The Pilot,	99		Glouteney <i>vs.</i> Lussier,	295	
Côté <i>vs.</i> Morrison,	252		Gore <i>and</i> Gury,	454	

Gorrie vs. The Mayor, Aldermen and Citizens of Montreal,	236	Mayor, Aldermen and Citizens of Montreal, Bélanger vs.	228
Grand Trunk R. R. Co., Kierskowski vs.	3	Mayor, Aldermen and Citizens of Montreal, Gorrie vs.	236
Guay and Blanchet,	181	Mayor, Aldermen and Citizens of Montreal, Beaudry and	104
Gugy, <i>Ex parte</i>	353	McCarthy and Judah,	369
Gugy, Gore and	454	McCarty, Dunkerly vs.	132
Gugy, Renaud and	246	McDonald vs. Miller,	214
Gugy, Renaud and	470	McDonald, Miller vs.	303
Guy, Berthelet and	299	McGillivray, Montreal Assurance Company and	401
Guy, Berthelet and	305	McMaster and Walker,	171
H		Michon, Larocque and	222
Hall and Dubois,	361	Miller, McDonald vs.	214
Haws, Bourassa vs.	135	Miller vs. McDonald,	303
Hearn, Wood and	332	Moffatt, Murphy vs.	477
Henderson, Warren vs.	108	Molson, Burroughs and	494
Hot'e, Gigon vs.	271	Montreal Assurance Company and McGillivray,	401
Hughes, Rousseau vs.	187	Mooney, Marchildon vs.	122
Huot and Danais,	235	Morrison, Côté vs.	252
Hussey, Wade vs.	511	Murphy vs. Moffatt,	477
J		N	
Jones, Robertson vs.	364	Naud dit Labrie vs. Clément	
Judah, McCarthy and	369	dit Labonté,	140
K		Noad, Tremblay and	340
Kerr vs. Gildersleeve,	266	Noad, Warren vs.	177
Kierskowski vs. The Grand Trunk R. R. Co.,	3	Noel vs. Chabot,	211
L		Nye, Seaver vs.	221
Labrecque, Fradet vs.	218	O	
Lalouette dit Lebeau and Delisle,	174	O'Hara, Barber vs.	216
Lampson, Smith vs.	193	P	
Langue doc and Laviolette,	257	Paquet and Robitaille	125
Larocque and Michon,	222	Parker, Russel vs.	229
Larocque and The Franklin County Bank,	328	Pilot, The, Collins,	99
Laviolette, Langue doc and	257	Platt and Charpentier,	481
Leclero vs. Caron,	287	Poulin, Fraser vs.	349
Ledoux, <i>Ex parte</i>	255	Prince Edward, The—Diaper	293
Lussier, Glouteney vs.	295	Q	
M		Quintin dit Dubois and Girard,	317
Marchildon vs. Mooney,	122	R	
Masson, Chapman vs.	225	Renaud and Gugy,	246

<b>Renaud and Gagy,</b>	470		
<b>Robertson vs. Ferguson,</b>	239		
<b>Robertson vs. Jones,</b>	364	<b>T</b>	
<b>Robitaille, Paquet and</b>	125	<b>Torrance, Strother vs.</b>	<b>302</b>
<b>Roche, Fraser and</b>	288	<b>Tremblay and Noad,</b>	<b>340</b>
<b>Romain vs. Dugal,</b>	209		
<b>Ross, Sinjohn vs.</b>	509	<b>U</b>	
<b>Rouleau vs. Bacquet,</b>	154	<b>Union Building Society, The,</b>	
<b>Rousseau vs. Hughes,</b>	187	<b>vs. Russel</b>	<b>276</b>
<b>Russel vs. Parker,</b>	229		
<b>Russel, Union Building So-</b>		<b>V</b>	
<b>ciety vs.</b>	276	<b>Vachon, Bernier vs.</b>	
<b>S</b>		<b>W</b>	
<b>Seaver vs. Nye,</b>	221	<b>Wade vs. Hussey,</b>	<b>511</b>
<b>Seymour, Freligh vs.</b>	256	<b>Walker, McMaster and</b>	<b>171</b>
<b>Simoneau, Blais and</b>	356	<b>Warren vs. Henderson,</b>	<b>108</b>
<b>Sinjohn vs. Ross,</b>	509	<b>Warren vs. Noad,</b>	<b>177</b>
<b>Smith vs. Lamson,</b>	193	<b>Wilcox vs. Wilcox,</b>	<b>34</b>
<b>Stevenson vs. Bisset,</b>	191	<b>Winscales, The, Eliot</b>	<b>350</b>
<b>Strother vs. Torrance,</b>	302	<b>Wood and Hearn,</b>	<b>332</b>
<b>Stuart vs. Eaton,</b>	113		

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# LOWER-CANADA REPORTS.

## DÉCISIONS DES TRIBUNAUX DU BAS-CANADA.

### SUPERIOR COURT.—MONTREAL.

Before SMITH, MONDELET and BADGLEY, Justices.

No 2079. { KIERZKOWSKI, ..... *Plaintiff.*  
                    VS.  
                    THE GRAND TRUNK RAILWAY COM-  
                    PANY OF CANADA ..... *Defendant.*

Held :—1o. That the mortmain restrictions upon the acquisition of real estate by mortmain corporations, were caused by the acquired property thereby becoming inalienable, not by the existence of the corporations being perpetual or continuous.

2o. That these restrictions applied to corporations aggregate, the clergy in general, religious bodies, fraternities, municipal guilds, and others of like nature, which form the class designated as mortmain corporations, *gens de main-morte*.

3o. That modern civil corporations, established for commercial and trading purposes, as joint stock or incorporated banking, manufacturing, railway companies, &c., cannot be included in such class, nor do mortmain restrictions apply to them.

4o. That two or more such civil corporations may unite to form one incorporated company, without such union being in itself a sale, or equivalent thereto, and without subjecting the resulting company to liability for the payment of seigniorial or feudal dues.

5o. That the deed of agreement set out in the plaintiff's declaration, was in law only in the nature of preparatory articles of union, not in itself a sale, or its equivalent, and not *translatif de propriété*, and in law could not and did not, by itself, establish the resulting company as a corporation.

Jugé :— 1o. Que les restrictions apportées à l'acquisition par les corporations en main-morte, ont pour cause la qualité d'inaliénable que prend la propriété acquise, et non la perpétuité ou continuité de telles corporations.

2o. Que ces restrictions s'appliquaient aux corps incorporés, le clergé en général, les communautés religieuses, les confréries, les municipalités, les corps de métiers, et autres semblables, composant la classe désignée sous le nom de *gens de main-morte*.

3o. Que les corporations civiles modernes, établies pour des objets de commerce et de trafic, telles que les compagnies à fonds communs, pour le fait de banque, manufacture, railroutes etc., ne peuvent tomber dans cette classe, et les restrictions de main-morte ne peuvent s'y appliquer.

4 Que deux ou plusieurs telles corporations civiles peuvent s'unir pour n'en former qu'une seule, sans que cette union puisse être considérée en elle-même comme vente, ou équivalente à vente, et sans assujétir la compagnie nouvelle au paiement de droits seigneuriaux ou féodaux.

5o. Que l'acte d'accord énoncé dans la déclaration du demandeur, n'était en droit, de sa nature, que des conventions préparatoires d'une union qui n'était elle-même ni une vente, ni acte équivalent, ni translatif de propriété, et ne pouvait légalement établir, et n'a pas lui-même établi, comme corporation, la compagnie qui en est résultée.

6o. That the defendant is not in law a mortmain corporation, nor subject to mortmain restrictions, and does not, in law, hold the lands in question in mortmain, as alleged in the plaintiff's declaration.

7o. That the defendant, the existing Grand Trunk Railway Company of Canada, was incorporated by the 18th Vic. ch. 33, when the seigniorial act of 1854 was in existence, by which all seigniorial dues were abolished, and which relieved the defendant's acquisitions from all seigniorial dues.

8. That the sums of money claimed in this cause are not for arrears of seigniorial dues accrued to the plaintiff previous to the existence of the seigniorial act of 1854; the recovery whereof is provided for by that act.

9o. That if the defendant were such mortmainor, *gens de main-morte*, and had acquired, as alleged, the realty in question previous to the legal operation of the seigniorial act of 1854, the declaratory provision of that act applies retrospectively to such acquisition, and relieves the defendant, as such mortmainor, from liability to the seigniorial *indemnité* claimed by the plaintiff for such acquisition made directly from another mortmainor.

10o. That the undertaking, of the Grand Trunk Railway of Canada is a work of public utility, including therein the realty acquired, and in question in this cause, and, therefore, not in law liable to the *lods et ventes* claimed by the plaintiff.

6o. Qu'au point de vue legal les défendeurs ne sont pas une corporation des main-mortes, ni sujets aux restrictions des main-mortes, et ne possèdent pas les terres en question en main-morte, ainsi qu'il est dit en la déclaration du demandeur.

7o. Que la Compagnie du Grand-Tronc de Chemin de Fer actuellement existante, a été incorporée par la 18me Vic. ch. 33, lorsque l'acte seigneurial de 1854 était en force, et en vertu duquel tous les droits seigneuriaux ont été abolis, et qui a exempté les acquisitions des défendeurs de tous droits seigneuriaux.

8. Que les deniers réclamés en cette cause ne sont pas pour arrérages de redevances seigneuriales échus au demandeur antérieurement à la mise en force de l'acte seigneurial de 1854, et au recouvrement desquels il est pourvu par cet acte.

9o. Qu'en supposant que les défendeurs fussent *gens de main-morte*, et eussent acquis les terres en question, ainsi qu'allégué avant l'opération légale de l'acte seigneurial de 1854, la disposition déclaratoire de cet acte s'applique rétrospectivement à telles acquisitions, et soustrait les défendeurs, comme gens de main-morte, à toute indemnité seigneuriale réclamée par le demandeur à cause de telle acquisition faite directement d'une autre corporation en main-morte.

10o. Que l'entreprise du Grand-Tronc de Chemin de Fer du Canada est un ouvrage d'utilité publique, qui requerrait les terres acquises, et dont il est question en cette cause, et, conséquemment, ne peut être assujétie aux profits de vente réclamés par le demandeur.

Judgment rendered the 23rd. November 1857.

BADGLEY, Justice :—The plaintiff, as seignior of St. François LeNeuf, in the district of Montreal, has instituted this action against the defendant for the recovery of £1852 3 2 for seigniorial dues, namely £1307 5 9 for the feudal *indemnité* or double fine, and £544 17 5, for *lods et ventes*, both claimed under a deed of agreement to which the St. Lawrence and Atlantic Railway Company and the Grand Trunk Railway Company of Canada were parties, whereby the St. Lawrence and Atlantic Railroad came into the possession of the Grand Trunk Company aforesaid, including therein a strip of land passing through the plaintiff's seigniori covered by that railroad, and upon

the assumed value of which the above estimate for *indemnité* and *lods et ventes*, respectively, has been calculated as demanded in this cause.

The *indemnité* is claimed by reason of the alleged mortmain character of the defendant, it being declared "that the land in question is now holden by the defendant in mortmain," and the *lods et ventes* due, by reason of the agreement being considered of an onerous character, and in the nature of a deed of sale, whilst the general liability of the defendant is rested upon the provincial legislation connected with the establishment of the contracting companies, and upon the covenants and stipulations contained in the agreement itself.

The peremptory exceptions pleaded by the defendant deny generally and expressly the plaintiff's pretensions, repudiate the mortmain character attributed, negative the onerous nature of the agreement, assert the defendant to be a mere trading incorporated company and the agreement itself mere articles of association and fusion of interests, without sale ingredients, and, finally, plead the seigniorial act of 1854 as full legislative relief from all claim for *indemnité*, and the public utility and character of the Grand Trunk Railway undertaking, as a legal discharge from the claim for *lods et ventes*.

A brief preliminary review of the provincial legislation in connection with this matter is necessary for the proper elucidation of the pretensions of the parties, and for the explanation of the judgment.

In furtherance of the general desire for the establishment of a continuous railway communication throughout the province, a bill was submitted in 1851 by the executive to the provincial parliament, which became law in that year, namely, the statute 14th. and 15th. Vict. ch. 73. "For the construction of a Main Trunk Line of Railway throughout the

whole extent of the province," which was declared "to be of the highest importance to the progress and welfare of the province, and that every effort should be made to insure its construction." In furtherance of this object, the act provided for the immediate construction of the line from Quebec to Hamilton at the public expense, out of public funds, declared the work to be a *provincial* work, and empowered the executive to purchase certain existing railway undertakings, and to take from their companies a surrender of their respective rights and properties for the public uses of the province. The act also provided that a private company might undertake the line, if its construction were found to be impracticable from the funds provided by the government, and extended to such company, and to existing railways which should form part of the Main Trunk Line, the advantage of the provincial guarantee, at the same time specially enacting and declaring the St. Lawrence and Atlantic Railway Company to be and form part of the Main Trunk Line.

In the following year, 1852, the statute 16th Vic. ch. 37 was passed, which incorporated a private company under the name of The Grand Trunk Railway Company of Canada, with the usual corporate and expropriatory privileges of railway charters, for the construction of a railway *from Toronto to Montreal* "as tending greatly to promote the welfare of the province." To this company the provincial guarantee was extended.

In the same year, the statute chapter 39 was also passed, since generally known as the Railways Union Act, which authorized the voluntary uniting together, as one company, of all present and future railway companies forming part of the Main Trunk Line, or the purchase of the one by the other, empowered the directors of the several companies to effect the amalgamation of their several capitals and contracts, upon terms to be settled by themselves, and allowed them by their agreement, for their companies, to give a corporate name

to the resulting general company after such union. This act specially pledged the provincial legislature to make such further legislative provision as should be required for giving full effect to the act itself, and to any agreement made under its provisions to be ratified in the terms of the statute. This statute was extended by the 16th. Vict. ch. 76, passed in 1853, to all railways intersecting the Main Trunk Line, or touching at the same places with that line, and it was provided that the name of the united company should be "The Grand Trunk Railway Company of Canada," if the company, established by the 16th. Vict. ch. 37, should be one of the united companies. The motive declared for the enactment of these union acts is stated in the preamble, "that "it would be of provincial advantage that the entire Main "Trunk Line should be under the management of one company, or of as small a number of different companies as "might be practicable."

The last statute in order, is the 18th. Vict. ch. 33, passed in 1854, manifestly to give effect to the agreement set out in the plaintiff's declaration, which was executed at London in April 1853. Before referring to the provisions of this last statute, it may be premised that the agreement was made by six provincial railway companies, including The Grand Trunk Railway Company of Canada, and The St. Lawrence and Atlantic Railway Company, under the provisions of the Railways Union Act; that it amalgamated the several railway undertakings of those companies together with that for the erection of the Victoria bridge by the Grand Trunk Railway Company, under the special act 16th. Vict. ch. 75; conditionally united all under the name of The Grand Trunk Railway Company of Canada; formed one capital of the several railway companies' capitals, together with the special capital and construction contract for the Victoria bridge, and stipulated that the future legislation contemplated by the original Railways Union Act should be had for the purpose of confirming and legalizing such of the provisions c

the agreement, the legality of which might be doubtful, but subjecting the stipulations of the agreement to the subsequent ratification of the shareholders of the several companies, which was in fact duly obtained before the passing of the act of 1854, the act last adverted to.

Then followed this act of 1854, 18th. Vict. ch. 33 ; the preamble of which recited the several acts of incorporation of the contracting companies, the special act for the construction of the Victoria bridge, the agreement above referred to with its subsequent ratification, and the stipulation thereby " that the several railways and works of the companies, including the Victoria bridge, should thereafter form one railway and work, to be called and known as " The Grand Trunk Railway of Canada ;" it also recited the legislative pledge of the Railways Union Act for the further legislation which might be required for giving full effect to that act, and to any agreement made under it, declared " that it is expedient that further legislative provisions should be made for enlarging the powers of the company &c., and that the said agreement and the amalgamation of the several companies *intended to be effected thereby &c. should be confirmed,*" it then enacted the confirmation of the agreement, that the united companies formed by the amalgamation *should be known and designated by the name of " The Grand Trunk Railway Company of Canada,"* applied and extended the railway clauses consolidation act to the said united company, provided for the conversion of the several companies' shares into a general capital stock &c., &c., and effected a fusion of all the companies and works, including those of the Victoria bridge, for the purpose of one Grand Trunk Railway Company and railway under one management.

It only remains to be added that the St. Lawrence and Atlantic Railway Company was incorporated by the statute 8th. Vict. ch. 25, with the usual railway charter provisions, and that the railway clauses act, 14th. and 15th. Vict. ch. 51, con-

tained general provisions for incorporating future railway companies, and for extending to them the usual corporate rights and incidents of incorporated companies, together with power for their general administration and direction.

The pretensions of the parties will now be examined as they have been submitted in argument with the authorities in support. And first, the plaintiff supports his claim to the *indemnité*, 1o. by the alleged mortmain character of the defendant, and 2o. by the sale character of the agreement. The first involves the ground of *perpetuity* attributed to the defendant's corporation as characteristic of a *mortmainor*, and upon this it would now suffice to reply by a simple dissent, as well from the proposition itself, as from the conclusions of the plaintiff's counsel, were it not for the great elaboration of their argument, as well as that of the defendant's counsel in reply.

It is quite true that in the early period of the histories of France and England, the acquisition and disposal of real estate was unrestrained, and so continued until the rapaciousness of the clergy and of the religious bodies of those times caused restrictions to be applied specially to their acquisitions. The royal revenue, as well as the feudal revenues of the great vassals and seigniors, became greatly affected by these spiritual holdings, and the royal remedy was found in the *lettres d'amortissement* of France, and the mortmain laws of England, whilst the seigniorial remedy was secured by the so called *indemnité*, paid by the mortmainor. Grant on Corporations, p. 98, observes, " But with  
" respect to lands and tenements, the legislature began early  
" to impose restrictions upon the right of corporations aggregate to acquire and transmit them in succession, by various statutes called Mortmain. These restraints were first  
" considered to be necessary in consequence of the extent to  
" which landed property was accumulating in the hands of  
" the great religious or ecclesiastical corporations, and the earliest of them is found in *Magna Charta*. Feudal subjects



“ granted in donations to churches, monasteries and other religious or charitable corporations, and thereby all *casualties* to the king and the mesne lords necessarily became lost where the vassal is a corporation which never dies, or because the property of those subjects is made over to a dead hand which cannot transfer it to another. Hence the doctrine of taking lands to religious persons by perpetual or rather continuous succession, preventing all chance of escheat, was known as early as the early times above mentioned in England, and had even then acquired the name of “ mortmain.” The necessity for similar restrictions was felt in France also very early. Montesquieu says that under the three races of the French kings, the clergy several times over acquired all the real property of the kingdom, “ *on a donné à plusieurs fois au clergé tous les biens du royaume.*” Renauldon, *Traité des droits Seigneuriaux*, p. 127, remarks that St. Louis, “ fut effrayé de voir que les biens des ecclésiastiques, *devenant inaliénables entre leurs mains*, étaient hors de tout commerce et que le clergé, par les privilèges accordés à cet état, étant exempt de tout service, et de toutes impositions publiques, s’il continuait d’acquérir, laisserait enfin aux peuples épuisés et dépouillés que le fardeau excessif des charges publiques. . . . Les plus anciennes de ces lois sont celles qui défendent aux ecclésiastiques d’acquérir aucune espèce de biens dans le royaume, sans la permission du Roi. . . . Depuis St. Louis jusqu’à Louis XV, par son Edit de 1749, ces défenses ont été si souvent réitérées qu’on ne peut plus douter de la parfaite incapacité que les gens de main-morte ont de pouvoir acquérir aucuns biens dans le royaume sans la permission du Roi.” The rights of the seignior were not interfered with by the royal licence, hence, the seignior in whose territory the *terres amorties* were situated also enforced his claim for the equivalent loss of his revenue by the *indemnité*; “ Il est clair,” says Renauldon, “ que le seigneur éteint à son égard les droits casuels qui pouvaient lui revenir par de fréquentes mutations et autres accidents de fief ; il a donc paru juste

“ que le seigneur retirât quelque chose qui pût à l'avenir  
 “ lui tenir lieu de récompenses de toutes ces pertes, et c'est  
 “ ce qu'on appelle le droit d'indemnité.” The Edict of 1749  
 plainly declares the legislative and royal appreciation of the  
 causes of mortmain restrictions, but applies them to the  
 institutions recognized as mortmain, “ les biens immeubles  
 “ qui passent entre leurs mains cessent pour toujours d'être  
 “ dans le commerce, en sorte qu'une très grande partie des  
 “ fonds de notre royaume se trouve actuellement possédée  
 “ par ceux, dont les biens ne peuvent être diminués par les  
 “ aliénations, s'augmentant au contraire continuellement  
 “ par de nouvelles acquisitions.” To the same effect is the  
 royal declaration of Louis XV, enregistered as law in  
 Canada in 1743, which declares that the royal permission  
 to acquire shall apply to all *communautés et gens de main-*  
*morte*, in the colony ; “ quelque faveur que puissent mériter  
 “ les établissements fondés sur des motifs de charité et de reli-  
 “ gion, il est temps que nous prenions des précautions effi-  
 “ caces pour empêcher etc., que ceux qui y sont autorisés  
 “ ne multiplient des acquisitions, qui mettent hors du com-  
 “ merce une partie considérable des fonds et domaines de nos  
 “ colonies, et ne pourront être regardées que contraires au  
 “ bien commun de la société.”

It is unnecessary to quote the many jurists who all con-  
 cur in the expression of opinion, that the *inalienability of*  
*the lands acquired by mortmain corporations, not the perpetuity*  
*of their corporate existence*, was the cause of the mortmain  
 legislation, but, among the number of anothers, Hervé says  
 that ecclesiastical and religious bodies are commonly  
 known as *gens de main morte* because their property “ est  
 “ dans une espèce d'état de mort-relativement au commerce,  
 “ et qu'il ne leur est pas permis d'en disposer comme aux  
 “ autres citoyens,” and this general opinion was strength-  
 ened by the fact that the acquisitions were without limit.  
 It is almost unnecessary to observe that the mere perpetuity  
 of corporations is in no way interfered with or abrogated

by the mortmain legislation of either France or England, or the subsistence of that perpetuity in connection with the mortmain "*institutions*" to which that special legislation applies, in as much as both expressly declare the necessity for that legislation solely by reason of the *inalienability of the property again by those mortmainors*.

It is almost useless to refer to english legislation upon this point, because the matter under discussion is purely of local law, but even in England, the motive for mortmain restriction was the same as that of France, and Grant, p. 129 et seq. clearly shows "that *corporations aggregate* could not alien in fee," and that the power to alien was not inherent in them, that no authority of a decided cause is to be found to sanction the idea, and that as late as the 9th Geo. II Ch. 36. intituled, "An act to *restrain the disposition of lands whereby the same became inalienable*," both sides in the House of Lords, in the debates upon that act, assumed most distinctly that corporations becoming possessed of lands could not alienate them &c. This author's observations are conclusive upon the point involved in this part of the argument with reference to that class of corporations aggregate.

The fallacy in the plaintiff's arguments appears to lie in the assimilating of the old mortmain corporations with the modern civil corporation, or incorporated trading companies, in viewing both simply as abstractions, *corporations*, and in attributing to both the principle of perpetuity alone as their sole characteristic and criterion of constitution, without considering at the same time the practical establishment and purposes of the modern incorporated companies, Merlin Verbo, Gens de main-morte, says: "Il est vrai qu'on appelle aussi gens de main-morte les communautés, corps et établissements publics, dont l'existence se perpetue par la subrogation toujours successive des personnes qui les composent et qui les administrent." So Grant remarks, "A corporation *qua* corporation does possess a *quasi* immortal character, as Coke expresses it, but it is in fact an in-

"stitution *calculated for, and capable of indefinite duration* : "it is an ideal body, a continuons identity endowed in its "creation with *capacity for endless duration*." This definition of this ideal creation will be found to measure and describe accurately the attributes of a *corporation proper, id est*, a corporation created *merely as a corporation*, without any restriction or limiting clause in the instrument of creation. "*It is not by any means true, however, that all existing corporations come up fully to the whole extent of the above definition, because corporations are the creatures of the crown and parliament, and consequently there is scarcely any limit to the variety of forms in which they may be produced.*" Kyd on Corporations, also observes, "That when it is said that a Corporation is immortal, we are to understand nothing more than that it is *capable of an indefinite duration*, and that the grant to the natural persons of the corporation made to them, in their corporate name, is not determinable on the death of the individuals, but continues as long as the corporation continues." The term perpetuity is only an incident to, but not the constituent of, the corporate existence, and was attached in France to the class distinguished by the royal legislation, and by the jurists, as *main-mortables*, or *gens de main-morte*, namely, the clergy in general, colleges, hospitals, *confrairies* and eleemosynary institutions which were held to be partly religions and partly civil, and afterwards to municipalities and city guilds. See Merlin, Rep. de Jur. vo. Gens de main-morte, Hervé, Bacquet, &c.. and this classification is sustained by the language of the Royal Edict and Declaration of Louis XV above referred to, and finds a parallel application in the *so called corporations aggregate* in England.

The difference is evident between these institutions recognized as mort-main in character and name, and subject to mortmain restrictions, and the civil corporations or trading incorporated companies of modern times, and that difference is thus expressed by Angell and Ames on Corpora-

tions : " These mortmain corporations are altogether different  
 " from the civil corporations created in modern times for  
 " an infinite variety of temporal purposes. The most nu-  
 " merous, and in a secular and commercial point of view,  
 " the most important class of private civil corporations, and  
 " which are commonly called companies, consist at the pre-  
 " sent day of banking, insurance, manufacturing and exten-  
 " sive trading corporations, and likewise of turnpike, bridge,  
 " canal and railroad companies, and others established for  
 " the promotion and engagement of individual adventure.  
 " The convenience of union and the aggregation of capital  
 " for public advantage in the extension of commercial pur-  
 " suits necessarily require the great object of an incorpora-  
 " tion, namely, the bestowal of the character and properties  
 " of individuality on a collective and changing body of men.  
 " By those means, perpetual succession of many persons  
 " are considered as the same, and may act as an indivi-  
 " dual, thereby enabled to manage its own affairs, and to  
 " hold property *without the perplexing intricacies, the hazar-*  
 " *dous and endless necessity of perpetual conveyances for the*  
 " *purpose of transmitting it from hand to hand.* The charter  
 " or act of incorporation, a law peculiar to itself, not only  
 " specifies the particular undertaking or business to which  
 " it is limited, but, to prevent monopolies, and to confine  
 " the action of incorporated companies strictly within their  
 " proper sphere, the acts incorporating them almost invari-  
 " ably limit, not only the amount of property they shall hold,  
 " or their capital stock, but limit also their purchase of lands  
 " within a certain amount, and frequently prescribe the  
 " purposes for which alone the land shall be purchased and  
 " liable, and the mode in which it shall be applied to effect  
 " these purposes." These authors, with others which need  
 not be cited at length, also observe the distinction to be taken  
 between trading corporations and common partnerships, the  
 latter being obviously defective in the coercive authority  
 required to render their rules obligatory, whilst the legisla-  
 tive impress of the former gives binding effect to their vo-

luntary articles of association. This legislative confirmation is indispensable to enable the parties to the compact to sue and be sued *as a company by a general name, to act by a common seal, and to transmit their property by succession*, "whilst the principal ingredient for procuring the act of incorporation is to limit the risk of the partners by removing from them their liability, *in solido*, however small their interest in the concern, to render definite the extent of their hazard and to divide the aggregate capital into shares easily susceptible of disposal." Woodworth, in his Treatise on Joint Stock Companies, goes over the same ground and observes, "that companies formed on the joint stock principle usually required an act of parliament for limiting the responsibility of the members to the sum subscribed by each individual, and that railway companies, formed for the purpose of executing works that cannot be carried into execution without the aid of legislation, are of this class, and require and obtain acts of incorporation."

These incorporated companies upon the joint stock principle, and sanctioned by parliament, are assimilated by Judge Story, in his Treatise on Partnership, to the French *société anonyme*, and French jurists sustain the similitude in every particular of its formation, purpose and management, as well as in its requisite sanction by legislative authority, Walewski, *Traité des Sociétés par actions*, says of this *société* "dans laquelle toute individualité disparaît pour faire place à une simple association de capitaux, les tiers trouvant leur garantie dans l'autorisation du gouvernement qui revise et approuve les statuts de ce genre d'entreprises." The French Code de Commerce has made special provision for such associations as the creatures of commercial wants. "Elle est qualifiée par la désignation de l'objet de son entreprise, elle est administrée par des administrateurs à temps révocables, les associés ne sont passibles que de la perte du montant de leur intérêt dans

“ la société, ils ne laissent que le capital pour répondre aux créanciers de l'association. Le capital se divise en actions d'une valeur égale, représentant le droit qu'on a dans une société anonyme, et la réunion de toutes les actions forme le capital de la société ; enfin elle ne peut exister qu'avec l'autorisation du roi, et avec son approbation par l'acte qui la constitue, qui doit être donné dans la forme prescrite par les réglemens d'administration publique.” See also Persil, Sociétés de Commerce, &c., &c.

Railway companies forming no inconsiderable portion of these incorporated associations are authoritatively defined to be “ Corporations having certain prescribed powers and privileges according to the statutes of their formation, and which vary in their provisions so as to suit the works and objects contemplated. A railway act is the instrument under which the partnership concerns are managed, and the rights of individuals coming in contact with the company are regulated. Their charter is a charter with the public ; hence, the Queen's subjects are compelled to submit to the contract upon the notion that it will be for the public good.” Moreover, these companies are immistakeably of a commercial character according to english law and are “ common carriers without the sanction of any clause in their act of incorporation.” So also by French law. Troplong, *Traité des Sociétés*, says : “ Les sociétés commerciales sont celles qui sont formées pour exercer un commerce, ou pour faire des actes de commerces, c'est leur but qui leur imprime le caractère commercial. Et, quant aux sociétés anonymes, leur intention se jugera par leurs habitudes, et par les circonstances au milieu desquelles elles se sont formées. Lorsque des entreprises de transport se lient à des entreprises de construction, la société qui s'y livre est une société commerciale ; ainsi une société qui a construit un chemin de fer, et qui ensuite exploite le transport des voyageurs et marchandises par ses wagons, est une société de commerce,” and Bousquet, *Dict. de Droit*,

says: "l'exploitation d'un chemin de fer par une compagnie constitue une entreprise de commerce, justiciable des tribunaux de commerce."

This general commercial character, in connection with such companies, is settled by provincial jurisprudence in the case of *The Seminary of Quebec, vs. The Quebec Exchange Association*, 3 L. C. Reports p. 76, in which it was held by the Superior Court at Quebec that the defendant was a Joint Stock Association, &c. "dont l'institution n'est pas perpétuelle, et qui n'est pas frappée de l'incapacité d'aliéner," that it was not a mortmain institution, and that the real estate purchased for the purposes of the institution did not give rise to *indemnité*.

In the particular case of the defendant in this suit, the act of incorporation of the company removes all doubt of its commercial character by enacting "that all suits and actions at law by or against the corporation shall be subject to the rules of evidence laid down by the laws of England, recognized by the Courts in Lower Canada in commercial matters."

These observations have been extended for the purpose of removing all doubt of the absolute dissimilarity between the ancient mortmain institutions and the modern incorporated trading companies, and of their entire difference in constitution, character and existence. In the latter, we find the legislative incorporation, the limitation in the acquisition of realty, and its alienability, the formation of a capital with its division into disposable shares, the interest of the shareholders in the property itself of the institution, consisting of the aggregate of the interest or shares, the benefits to be enjoyed by the public under the terms of the charter, but the property and acts of the corporation being, however, for the sole advantage of the individuals interested in the stock, and in view of their individual benefit, and, finally, being the private property and object of the corporation; these



are all essentials of those incorporated companies, whilst the absolute converse of these particulars accompanies the real mortmain institutions, indicating the broad and distinguishing feature of distinction and difference subsisting between those two classes of corporations, and manifestly leading to the conclusion that the defendant is not the alleged mortmainor of the plaintiff, but “ *a commercial partnership in-vested with corporate functions of considerable but limited extent, in which the characters of partnership and corporation are legislatively combined,*” and in absolute and direct contrast with the religious and eleemosynary or municipal institutions to which the mortmain character was really attached by jurists, and recognized in the legislative enactments of the French kings, including those of Louis the XV above referred to, and specially in his royal declaration enregistered as law in this province.

It should be stated that neither the Railway Clauses Consolidation Act, nor the defendant’s statutory charter adopting the clauses act, make mention of, or reference to, *lettres d’a-mortissement*, or to mortmain itself, either in word or provision, and that the clauses act empowers the defendant not alone “ *to purchase, hold and take lands* ” &c., but also “ *to alienate, sell and dispose of the same.*”

The mortmain character, therefore, as so known and distinguished, being manifestly inapplicable to the defendant, the allegation of the plaintiff’s declaration that the *land* in question *is now holden by the defendant in mortmain*, or in other words, and by legal implication, that the defendant is a mortmainor, is unsupported by law ; upon this ground, therefore, the plaintiff’s claim for *indemnité* cannot be legally sustained.

Beside this unsupported pretension, the claim for *indemnité* is further rested also upon the onerous nature of the agreement as an actual conveyance and *sale* by the St. Lawrence and Atlantic Railway Company to the Grand Trunk

**Railway Company of Canada.** Now, it is an undeniable proposition of law that every acquisition by a mortmainor entails *indemnité*, whilst it is equally undeniable that the *acte* or deed of conveyance must in itself be *translatif de propriété*, and that the legal requisites of a deed of sale, the absolute transfer of the property sold and a price agreed upon for it, are legal qualities essential to the constitution of such sale.

A reference to the provisions of the Railways Union Act, and to the covenants of the agreement as set out, made and executed under those provisions, evidence their merely preparatory character, and as only creative of elements for the union of the railway companies and their respective railways, the aggregation of their capitals into one general stock, the adoption of the several companies' shareholders into one general company, the completion of the several lines of railway, and the assumption of the several construction contracts and of the liabilities of the several companies, including of course interest due and unpaid to the shareholders by the St. Lawrence and Atlantic Company and others named, in all which the Victoria Bridge charter and contracts were included by the terms of the agreement. To assume the mere union of companies in itself to be a sale, or the transfer of equivalent shares in the united, for the shares in the several companies, to be a legal ingredient of a sale is simply ridiculous, and it is equally so to make the payment by the united company of the interest due and payable to the several shareholders of the named companies, to be a consideration or price. Among those amounts of interest, that due to the St. Lawrence and Atlantic, in their case amounted to £75,000, which is assumed to be the price or consideration of the agreement to unite that railway, almost complete with a stock capital of £1,225,000, secured by provincial guarantee, and of which considerably more than half had been paid in. The agreement does not recognize this as a price or consideration, but assumes

it as a debt due, as much as wages or materials purchased and remaining unpaid. The essential qualities of a sale or its equivalent *act, the absolute transfer, de la pleine propriété d'un héritage, and moyennant un prix*, are wanting in this agreement. The union effected by it was a mere fusion of interests for a common and reciprocal advantage in so far as the several shareholders were concerned, and the agreement itself was only preparatory or provisional articles of association, for the common benefit of the general association, to be afterwards completely established in the same manner as similar provisional articles of association for a public or private undertaking might be entered into by individuals, to be completed and perfected afterwards for their private and personal advantage. The law no more prevents companies from aggregating themselves into one united company, than individuals from forming a co-partnership. Grant, p. 48, says: "a corporation may be compounded of several others", and without additional citations, it will be found in 3 Exchequer Rep. p. 320, "so two corporations may be made one by uniting one to the other, but the resulting corporation must have express power by statute to sue etc.," So also it is laid down "though corporations may unite, it appears that with respect to all corporate bodies, created by, and in accordance with and pursuance of, acts of parliament they cannot surrender, but they continue united and act and are known as one corporation, but when a separation takes place they revive in their original formation." "An act of parliament will furnish the only means of removing the corporate charter from corporations created by charters passed in parliament." The distinction will be obvious between the surrender of the charter and the union of the chartered property with other chartered property for a common object, in other words, the union of these incorporated railway companies for the establishment of a common Main Trunk Line of Railway throughout the province and under one management.

Considering these admitted principles and authorities of law in connection with the agreement in itself only as in the nature of mere articles of co-partnership, and independent of parliamentary sanction, the Declaration not going beyond the agreement in its relation, and making no reference whatever in terms or otherwise to the provisions of the 18th. Vict. ch. 33, the only enactment in connection with, and subsequent to the agreement, it is evident, admitting the legality of the union and the non removal of the several charters by act of Parliament, that the agreement in itself did not contain the attributes of such an act, but simply professed to unite several independent companies into one, with their several undertakings as one, established an association of the individual companies as one general company, and subjected them, in that respect, under the stipulations of the agreement upon which alone the plaintiff rests, to the same principles and rules of law as properly apply to associations or partnerships of individuals; Troplong, *Traité de Société*, explains these : “ Il est certain que pendant la durée de la société il y a communication et aliénation. *Res continuò communicantur*. “ Seulement, cette aliénation n’est pas absolue, et à la fin de la société, chacun retire sa part. Ce n’est pas une aliénation absolue comme celle qu’engendre la vente ; l’associé n’abdique pas sa chose radicalement et à tous jours. Le contrat de société est fort différent de la vente, ainsi que les feudistes l’ont expliqué dans leurs recherches sur les retraits ; jamais il n’a équipollé à la vente.” And Pothier, *Traité des Retraits*, no. 103 : “ Le contrat de société est un contrat qui n’est ni équipollent, ni ressemblant au contrat de vente.” and Bacquet requires “ une vraie vendition.” As respects the Grand Trunk Railway Company, therefore, the individuality of the partners survives, the alienation of the property, *mise*, of each, is not absolute, and the criterion of price is absent. Moreover, the very statute which anticipated and enacted preparatory provisions for the union of the companies, the Railways Union

Act itself, in contemplation of their possible amalgamation, enacted two distinct and separate modes of effecting it, 1o. by the voluntary union of the companies, or 2o. by the purchase by one from the others, or any of them, with distinct and special provisions for each particular mode, for the former, by providing for the aggregation of their capitals and shareholders, and authorizing the union to assume the liabilities, engagements and construction contracts of each and all, and for the latter, by authorizing the purchasing company to increase its capital to an amount sufficient to liquidate its purchase price, and to complete their own as well as the purchased railroad undertaking ; in the former, providing for a union by voluntary agreement upon equal terms, in the latter, providing the mode for raising a capital as the price of the purchase. The distinction has been drawn between the two modes broadly and unmistakeably by the legislature itself in its own plain and unambiguous enactment, and the agreement moreover has adopted the former mode and repudiated the latter. Under all these circumstances the agreement does not assume in law the character of a sale, or its *acte équipollent*, nor support the plaintiff's pretension as being an *acte translatif de propriété*.

The argument deduced by the plaintiff from the language of, or terms employed in, modern french fiscal regulations, or from reasons given in support of such particular tax there, will not avail in this case. In that country a revenue is levied by tax upon the excess of a capital, *mise*, brought by one partner into a concern, more than the other partner, and this tax is endeavoured to be paralleled with the seigniorial *indemnité* of feudal France. In the same spirit the *Cour de Cassation* declared the old *droits de controle* and *insinuation* specially imposed and levied under the royal Edicts of 1703, 1704 and 1708, to have been seigniorial, and therefore declared the legality of the fiscal impost of 1790, but at a time when seigniorial dues and rights had been abolished in France. State necessity in France has im-

sed state taxation upon an almost endless variety of useful objects, and even upon railroads themselves, objects of the most positive public advantage, Bousquet, "Dict. de Droit," says: "*Les chemins de fer sont soumis à un impot.*" &c.

The modern use of ancient terms as *amortissement*, *impot de main-morte*, has also furnished support to this argument of the plaintiff. But Bousquet, in reference to the former, explains the distinction between its ancient and modern application: "Anciennement on appelait ainsi la permission que le roi, moyennant finance, accordait aux gens de main morte, tels que les religieux, les communautés, les confréries, etc., etc., d'acquérir des héritages, et comme ces héritages ainsi acquis n'étaient pas dans le commerce, et ne pouvaient plus être vendus, ce qui privaient les seigneurs des profits féodaux et casuels qu'ils percevaient a chaque mutation il leur était dû une indemnité. Aujourd'hui l'amortissement ne s'applique guère qu'au fonds consacré à l'extinction de la dette publique, (sinking fund) et à la caisse du bureau d'amortissement qui est chargé de cette opération."

With respect also to the modern terms, *impot de main-morte*, this also is a tax like all taxes subject to increase or diminution, or entire abolition, as state necessity might dictate, and is imposed upon *sociétés anonymes* which are declared, generally, to reach beyond the ordinary duration of mutations, and because "les associés se succèdent les uns aux autres sans payer de mutation." Championnière in his "Droits d'Enregistrement" in which he has classed the varieties of registration taxation in France, refers to this impost, and says that though most "*sociétés comportent une durée fort longue, qu'il n'est pas vrai de dire, tel qu'à déclaré la législature, que les associés se succèdent*" &c., he declares this ground false and unsound in as much as "les associés ne se succèdent pas les uns aux autres, que dans les

sociétés dites *Tontines*, supposant toute fois que tels droits des survivants s'accroissent à titre héréditaire du droit des prémourants."

The use of the old french terms, as above, does not involve the recognition of the old Mortmain institutions known in connection with those terms, nor should modern french judicial opinions control, when they are plainly opposed to those recognized and enforced in this province. Our courts have always held the *droit de controle et insinuation* to be fiscal taxation not in force in this province, and in no respect seigniorial, as the *Cour de Cassation* has done.

Upon the whole, the mortmain character is not *legally* attributable to the Grand Trunk Railway Company of Canada, and the agreement is not in law *translatif de propriété*, and therefore the Declaration shews no legal claim to either *indemnité* or *lods et ventes*.

But, on the other hand, the special defence set up, in the event of the grounds of exception above stated not being allowed, must be considered : previous to the investigation of this defence, and as a preliminary, it is proper to become acquainted with the defendant in this cause, the legal origin and present statutory existence of that incorporated company, and under what right or title it *now holds the lands in mortmain* as alleged in the plaintiff's declaration, which impleads the defendant as an existing Corporation by the name of "The Grand Trunk Railway Company of Canada," but without setting out in the declaration any charter of incorporation either royal or legislative. A short review of the legislative acts above referred to will supply the omission.

The 16th. Vict. ch. 37, incorporated a number of individuals under the above name, for the construction of a railway from Toronto to Montreal. The Railways Union Act, of the 16th. Vict. ch. 39, authorized the directors of the united

companies to give a name to the resulting company to be formed by their union, with the pledge of future legislation, if required, to give this agreement of union full effect. The 16th. Vict. ch. 76, amended and extended the previous act, and enacted that the resulting company should be The Grand Trunk Railway Company of Canada, if the company incorporated by that name under the 16th. Vict. ch. 37 should be one of the uniting companies. The parties to the agreement included the Victoria Bridge undertaking and contracts in the union, and admitted the construction contractors of that work as parties to the agreement, though that undertaking was not in the contemplation of the railways union act : all these parties nevertheless assumed to name the resulting company, with the express stipulation and agreement, however, covenanted in the agreement, for the future legislation above adverted to. Finally, the 18th. Vict. ch. 33, after special recital of the statutory charters of the companies, of that for the construction of the bridge, of the agreement and its covenants and of the provision for future legislation, declared the expediency, among other things, of confirming the agreement, and of amalgamating the companies &c., &c., and enacted that confirmation, incorporated the resulting or union company, by incorporating with this special act, 18th. Vict. ch. 33, the provisions of the Railway Clauses Consolidation Act 14th. and 15th. Vict. ch. 51, one of which enacts " the incorporation of every company established under any special act making it a body corporate " *under such name as shall be declared in the special act* " &c., and finally provided that " *the united company shall be known and designated by the name of " The Grand Trunk Railway Company of Canada.*" Now, the law has declared " the name of a Corporation to be in all cases an essential part of the metaphysical creation, and that which operates more than any other property of a Corporation, to give it the appearance of continuous identity " so also, " the general rule with respect to the name of the Corporation is that every charter of incorporation ought to name the Corporation. " " In the



case of statutory Corporations, the name must be given by the act of Parliament, constituting the Corporation." See Angell and Ames, Grant, Wilcocke.

The appropriation of a name in the agreement by the contracting parties to the compound or resulting company, could in law give no corporate or legal denomination to the company as an existing corporation, nor could the corporate name attached to that company by the amending Railways Union Act have that legal effect, inasmuch as operations not contemplated by the Railways Union Act were introduced into and formed part of the substance of the agreement. The 18th. Vict. ch. 33, alone, therefore, gave that property to the companies' amalgamation, swallowed up, as it were, the individual existence of the previous charter, and gave corporate existence to the defendant by the effect of and under its provisions. The vitality of the defendant was established by the 18th. Vict. ch. 33, alone, and the effect of that statute was to suspend the separate operation of the previous individual charters during the more general existence of the resulting company. It is moreover established law "that a subsequent act of Parliament may control a prior statute" and that legal proposition is maintained and enforced in 3 Exchequer Rep. p. 320, *The London and Brighton and South Eastern Railway Company versus Goodwin*, in which the amalgamated company sued upon a bond conditional in favor of one of the companies forming the amalgamation, and executed upon that event, in which it was decided "that the last statute in point of time controls, in other words, that the new joint corporation is in the place of the several companies." This compound company incorporated by the act of 1854, 18th. Vict. ch. 33, can be none other than the defendant which alone can be *The Grand Trunk Railway Company of Canada*, and which, alone, can by any possibility hold the railway lands for which the *indemnité* and *lods et ventes* are claimed in this suit. The defendant, consequently, can date its existence only from the 18th. December 1854, when that act, the 18th. Vict. ch. 33, became law.

Proceeding now to the special defence under the seigniorial act of 1854, it will be observed that its declared object and intention are the abolition of all feudal rights and duties in Lower Canada, and that it provided the means and appliances for effecting the purpose. It was eminently a relieving statute and necessarily must receive, in the terms of its own 38th. section, and in conformity with law, "the most liberal construction possible with a view to ensure the accomplishment of the intention of the Legislature as hereby declared" "to abolish as soon as practicable, all feudal or seigniorial rights, duties and dues &c." By this act, the abolition of the seigniorial tenure in itself abolished all claim for seigniorial dues upon the transfer, sale or other alienation of the lands in question, unless effected before that act became law. Hence, under the general purview of the act, the plaintiff could only lay claim to arrears due by the defendant. But the two acts, the 18th. Vict. ch. 33, and the seigniorial act 18th. Vict. ch. 3, came into force on the same day, 18th. december 1854, and whatever acquisitions the defendant may have made, could, by no possibility, give rise to arrears accrued before the existence or the passing of those acts, or could be protected by the 36th. section of the seigniorial act, "*reserving to the seigniors their rights to dues and duties accrued and due before that act was passed.*" The seigniorial act would otherwise not be a relieving statute, and would, by implication, create prospective dues which its provisions literally and plainly abolished and intended to abolish.

With reference to the lands themselves, it cannot be denied, that, in law, prior payment to the seignior of the *indemnité* claimed upon their original acquisition, relieved them from all future feudal and seigniorial dues, until they passed out of the hands of the party making the payment; till that event they were, as Bacquet, p. 399 says, "*autant que les héritages amortis sont faits allodiaux par ce moyen francs, libres et exempts de tout droit féodal, seigneurial et casuel.*" Now these lands could not have passed to the de-

feudant until after the seigniorial act had come into force, 18th December 1854, and until and up to that time they were *affranchies* from all Seigniorial dues, and specially from the *indemnité* and *lods et ventes* claimed by this suit from the defendant as their holder in mortmain.

But the seigniorial act is declaratory in its enactments, as well as relieving: the 33rd section covers all lands which had been commuted by the seigniors, and declares them *to be*, and *to have been*, from the day of the date of the deed of commutation free from all seigniorial rights, and holden *en franc aleu roturier*. In a similar spirit the 34th section declared and enacted that "All lands upon which mortmain dues (*droits d'indemnité*) have been paid to any Seignior, and which have not been sold or conceded since such payment to parties holding otherwise than in mortmain, are hereby declared *to be*, and *to have been*, from the day of the date of such payment &c. released from all Seigniorial dues and duties, and held *en franc aleu roturier*, but subject to the payment of a *rente constituée* equal to the *cens et rentes* legally due thereon."

The retroactive character of these enactments is too evident to require remark, whilst the declaratory character of both, and specially of the latter, is equally manifest, settling the moot question of the non liability of lands held in mortmain, and passing from one mortmainor to another, to the *double indemnité*, or so long as they continued under the original mortmain holding, and that in effect no actual alienation of property in such a state of things was supposed in law to take place, in so far as the rights of the seignior to *double indemnité* were involved.

The language of this enactment, the 34th section, is peculiarly precise and perspicuous, and, according to all well established rules of legal interpretation, "must be taken "in its ordinary and familiar signification and import, and "as to the language employed, regard must be had to its

“ general and popular use.” Dwarris on Statutes pp. 70, 2. 3. remarks that “ When the Legislature has used words of a “ plain and definite import, it would be very dangerous to “ put upon them a construction which would amount to “ holding that the legislature did not mean what it expressed.”

The Seigniorial Act of 1854 became, by its amending act, operative and effectual for the absolute and entire abolition of the tenure, dues and duties, on and from the 18th December 1854, as well as for the enforcement of its declaratory law. This action is personal in its nature against the defendant, as the holder of the lands in mortmain, which are not alleged by the plaintiff *to have been sold or conveyed to any parties holding otherwise than in mortmain* since the acquisition by the St. Lawrence and Atlantic Railway Company, and which could not have been acquired by the defendant previous to its creation as an incorporated company on the 18th December 1854, at which time all seigniorial dues were abolished. Assuming, therefore, the payment of the *indemnité* originally upon the lands in question, before the 18th December 1854, and not specially denied, and that these lands continued to retain their original mortmain character at that date, the seigniorial act expressly declared them *to be, and to have been, free and released from all seigniorial dues and duties from the day of such payment*, manifestly at some period before any possible acquisition by the defendant, and from that time held *en franc aleu roturier*, free of any feudal or seigniorial dues or duties whatsoever.

Finally, even admitting the defendant to be a *main-morte*, and to have acquired the lands *à titre translatif de propriété* before the passing of the seigniorial act, the *double indemnité* could not be claimed as arrears accrued due under the 36th section of the statute, because being the acquisition by one mortmainor from another, the 34th section would protect the transaction and prevent the accruing of dues to arise therefrom.

The general question of the retroactivity of legislative acts cannot be brought up for discussion in this cause. This Court cannot gainsay the power and right of the Legislature in view of a great public good to provide for the abolition of the seigniorial tenure, or, in its supreme legislative will, to declare what is, or shall be, the law in relation to most assumed and contested points of that tenure law. Had the intention expressed or the language used by the Legislature been doubtful, the duty of this court would have been to discover the one, and to give effect to the other, under subjection to legal rules of interpretation; in this matter, the court cannot interfere, the language and intention are both explicit.

Sedgwick, on Statutory and Constitutional Law, p. 411, observes: "the rule is that an act is to be construed as prospective in its operation in all cases susceptible of doubt, but this could have no application to a case where the legislature has directed, in language too express and plain to be mistaken, that they designed to give the statute a retroactive operation, in such case there is no room for interpretation."

From these considerations, the pretensions of the plaintiff are altogether unsupported by law, and must be rejected as well for the *indemnité* as for the *lods et ventes*. But the defendant has objected specially against the claim for *lods et ventes*, *the public utility of the defendant's undertaking*. Any lengthened discussion of this point might have been avoided, because it is admitted on both sides that the claim for *lods et ventes* cannot be enforced, except upon sale, *une vraie vention* or its *acte equipollent*.

"Les lods et ventes sont dûs, non seulement à cause de la vente des héritages, soit judiciaire, soit volontaire, mais encore pour toutes les mutations équipollentes à vente, c'est-à-dire, pour tout acte qui transfère la pleine propriété d'un héritage moyennant un prix."—Anc. Denizart, vo.

*Lods et Ventes.* The agreement through which these are claimed has been declared not to be a sale, or *acte équipollent à vente*, and, consequently, not productive of *lods et ventes*. This part of the claim might have rested here, but the defendant has, in addition, urged the legal ground of public utility in discharge, and submitted a very long and influential number of authorities in support. It would be too tedious to refer to all, and one or two only will be selected for citation, premising, however, that the public utility of the undertaking is settled by the various statutes in relation to the establishment of the Main Trunk Line, and of the defendant as such, and by the opinion of french jurists who have treated of Railways. Bousquet observes "l'établissement d'un chemin de fer constitue des travaux d'utilité publique pour lesquels la Compagnie qui les entreprend est subrogée aux droits de l'Etat lui-même," so also another author, "Lorsque pour l'exécution de travaux publics, des concessionnaires sont autorisés à recourir à la voie de l'expropriation pour se procurer le terrain nécessaire à leur exécution, ce n'est pas dans leur intérêt que l'expropriation est requise, c'est dans l'intérêt général, etc." This public utility being admitted, the authorities of the defendant sustain the pretension for discharge for *lods et ventes*. Livonnière gives as a reason: "parceque l'intérêt particulier du seigneur doit céder à celui du public," citing Mainard and Chopin in support Bourjon says: "la fauteur d'une vente pour l'utilité publique l'affranchit du droit de *lods et ventes*." Hervé 3 vol. p. 23. "vente pour cause d'utilité publique, par exemple pour la confection d'un grand chemin, il n'y a pas de lods et ventes: Une vente suppose un consentement de la part du vendeur, et dans le cas d'utilité publique, le consentement du propriétaire est indifférent, parceque c'est toujours malgré lui qu'il abandonne sa chose. Lorsqu'il y a deux intérêts en concurrence, et qu'ils sont inconciliables, le plus petit doit céder au plus grand, par la seule raison que celui-ci est plus puissant. Dans le cas d'utilité publique, c'est donc

“ user de son droit que de disposer de la chose d’un parti-  
 “ culier, ce n’est pas traiter avec lui, ce n’est pas acheter  
 “ de lui etc., l’indemnité qu’il reçoit ne lui est pas due  
 “ comme prix d’une vente, ou d’une convention volontaire  
 “ et synallagmatique, puisque dans le cas d’un pareil aban-  
 “ don il n’y a rien du fait du propriétaire, et qu’il n’y a point  
 “ de véritable vente, le consentement du seigneur est inutile,  
 “ la chose fut elle entre ses mains, on en disposerait égale-  
 “ ment ; même entre ses mains, on ne lui doit, conséquem-  
 “ ment, pas le profit du quint (lods et ventes) qui n’est autre  
 “ chose que le prix de son approbation, puisqu’on n’a pas  
 “ besoin de son approbation.” This reasoning is sustained  
 by a multitude of authorities, among which will be found  
 the case reported in 1 Lower Canada Reports, p. 91, Grant,  
 vs. The Principal Officers of H. M. Ordnance.

It is with regret that the grounds of the judgment have been extended to this length, but the importance of the legal points discussed, the amount involved in the cause, with the very large additional litigation for other similar claims dependant upon the result of this suit, and the great and minute elaboration of the argument on both sides at the bar, appeared to require a close examination of every point submitted, as well as the citation of authorities in their own language and expression, in explanation of the conclusion arrived at by the majority of the Court which dismisses the plaintiff’s action.

The judgment is as follows :—

Judgment.—The Court, &c.... Considering that the deed of agreement in the plaintiff’s declaration mentioned is not in law a sale, or its equivalent act, *acte equipollent à vente*, nor an *acte translatif de propriété* of the realty therein described, to the defendant ; considering that the union of the St. Lawrence and Atlantic Railroad Company with the Grand Trunk Railway Company of Canada, and the other Railway Companies, all parties to the said deed of agree-

ment, as in the said agreement and declaration stated, is not in law such mutation and alienation as rendered the defendant liable for the *indemnité* and *lods et ventes* demanded in this action by the plaintiff; considering that the defendant is not in law, or mortmain or *gens de main morte*, subject to the payment of seigniorial *indemnité* for acquisitions by the defendant of Real Estate for the purposes of such defendant, and that the lands in the plaintiff's declaration alleged to be held by the defendant in mortmain were not by law so held in mortmain; considering that the defendant, even if such mortmainor, and if such acquirer of said Realty and lands previous to the legal operation and effect of the Seigniorial Tenures Act, was, by the said last act declared to be relieved and freed from the payment of seigniorial *indemnité* for such acquisitions made by the defendant, directly from another mortmainor, previous to the legal operation of the said act, such acquisitions being held by the defendant at the time of the operation of the said act; considering that the sums of money demanded by the plaintiff in this action are not in law for arrears of seigniorial dues, accrued and due by the defendant to the plaintiff previous to the legal operation in that respect of the said Seigniorial Tenures Act; and further, considering that the Grand Trunk Railway, including therein the said realty and land, is by law a work of public utility, and that the acquisition of the said lands did not in law render the defendant liable for the payment of the *lods et ventes* demanded by the plaintiff in this action, doth maintain the peremptory exceptions of the defendant, and doth dismiss the plaintiff's action with costs. (The Hon. Mr. Justice Smith, dissenting).

CHEERIE, DORION and DORION, for plaintiff.

BARNARD, counsel.

CARTIER and BERTHELOT, for defendant.

LORANGER, Q. C. counsel.



QUEEN'S BENCH, { DISTRICT OF ST. FRANCIS.  
APPEAL SIDE.

Before :—Sir L. H. LaFontaine, Bart. Chief-Justice.  
AYLWIN, DUVAL and CARON, Justices.

WILCOX, *et al.*, ..... *Appellants.*  
and

WILCOX, ..... *Respondent.*

Held :—1o. That before the British act, 6 Geo. IV, cap. 59, commonly called the Canada Tenures Act, became law in Lower Canada, the customary dower of the Custom of Paris was claimable on lands in Lower Canada granted and held by the free and common soccage tenure.

2o. That by the above British Act, the law of England as to dower, descent, and alienation, was introduced into Lower Canada, as an incident of the tenure of lands held in free and common soccage.

3o. That the defendant, Sophia Blodget, being married to Joseph Wilcox on the 31st January, 1825, before the above act became law, while the said Joseph Wilcox was proprietor of lands in Lower Canada, held by the tenure of free and common soccage, was entitled to claim on the land in question her customary dower under the Custom of Paris.

Jugé :—1o. Qu'avant la promulgation de l'Acte Imperial, 6me. Geo. IV, ch. 59, communément appelé l'Acte des Tenures du Canada, le douaire coutumier de la Coutume de Paris dans le Bas-Canada, s'appliquait aux terres tenues en franc et commun soccage dans cette Province.

2o. Que par le dit Acte Imperial les lois anglaises, quant au douaire, à l'hérédité, et à l'aliénation des biens, ont été introduites dans le Bas-Canada, comme incident de la tenure des terres en franc et commun soccage.

3o. Que la défenderesse, Sophia Blodget, s'étant mariée à Joseph Wilcox, le 31 janvier 1825, avant que le dit acte ne devint loi, et pendant que le dit Joseph Wilcox était le propriétaire de terres dans le Bas-Canada, tenues en franc et commun soccage, elle était en droit de réclamer sur telles terres le douaire coutumier de la Coutume de Paris.

Judgment rendered the 3rd. October, 1857.

This was a petitory action brought by the respondent, plaintiff in the Court below, to recover the possession of a farm, held in free and common soccage, from the appellants, defendants in the Court below, his title was alleged to be a deed of lease and release, executed before a notary and witnesses on the 2d February, 1826, by Joseph Wilcox, in his favor.

To this action it was among other exceptions pleaded that the appellant, Sophia Blodget, the wife of Benjamin Wilcox, was the proprietor, à titre de douaire coutumier, of one half of the property claimed, having been married to the said Joseph Wilcox, the vendor of the respondent, on the 31st January, 1825, and of the other half by virtue of the last will of the said Joseph Wilcox, dated the 6th march, 1846.

That she had always been in possession of the said lot, and that the respondent had never had the tradition thereof, and that under both her titles she was entitled to be kept in possession in preference to the respondent.

Upon this issue the principal point submitted to the Superior Court was, whether lands held in free and common socage were subject, so far as relates to descent, dower, and alienation, to the rules of the french law, as in force in Lower Canada, or to those of the english law, before the imperial act, 6th. Geo. IV., cap. 59, became law in Lower-Canada.

The other facts of the case appear from the judgments in the cause and the observations of the judges.

The Court below, composed of Bowen, Chief Justice, and Day and Meredith, Justices, rendered the following judgment, on the 30th January, 1856.

“ The Court, &c.,—Considering that the plaintiff hath proved the material allegations of his declaration, and that the defendants have failed to establish that by reason of the marriage of the said Sophia Blodget with the late Joseph Wilcox, and by virtue of the laws in force, in that behalf, the land and premises in the said declaration described and sought to be recovered, were made and became subject or liable to be taken or held by the said Sophia Blodget, by right of dower for her legal and customary dower, *douaire légal et coutumier*, in the manner by her alleged, and that neither by reason of such pretended right, nor of any other matter or thing by the defendants alleged in their pleas in this cause filed, ought the plaintiff to be prevented from obtaining the conclusions of his said declaration, doth dismiss the said plea, and doth adjudge and declare the plaintiff to be the owner and proprietor of one hundred and fifty nine acres of land, &c., (*description*,) and the said defendants, who are in the unjust and illegal possession of the said one hundred

and fifty nine acres of land, hereinbefore last described, adjudged and condemned to desist from, quit and abandon the same, and deliver up the same and every portion thereof to the said plaintiff, &c. Saving to the said Sophia Blodget such recourse as by law she may have, in or upon the said lot of land and premises, by reason of her marriage with the late Joseph Wilcox. The honorable Chief Justice Bowen, dissenting."

SIR L. H. LAFONTAINE, Bt. Juge-en-Chef:—1. La question de savoir quelles sont les lois qui ont régi les terres en *franc et commun socage*, depuis la cession du Canada à l'Angleterre, et si ce sont encore les mêmes lois qui les régissent dans le Bas-Canada, est la principale question de droit que cette cause présente à notre examen.

Cette question, qui naguères a créé une si vive agitation, parce que malheureusement elle a été le plus souvent discutée au point de vue des intérêts privés et sous l'influence des préjugés, plutôt qu'au point de vue purement légal, n'offre plus aujourd'hui le même intérêt qu'elle a pu avoir par le passé. Bientôt elle ne sera plus que du domaine de l'histoire, si je comprends bien la portée d'un acte récent de notre législature, intitulé : "Acte pour fixer la loi relativement aux terres tenues en *franc et commun socage* dans le Bas-Canada," (chap. 45), promulgué le 10 juin 1857, par conséquent depuis que cette cause a été plaidée devant ce tribunal. Cependant le nouvel acte excepte de ses dispositions les procès encore pendants ; ces procès devant être jugés comme ils eussent dû l'être avant sa promulgation. L'on nous dit que cette cause sera probablement la dernière dans laquelle la question puisse être soulevée ; si c'est le cas, je m'en félicite. Celui qui voudra écrire l'histoire de notre législation, aura seul le privilège de s'en occuper à l'avenir.

Pour être traitée à fond, la question exigerait une bien longue dissertation, étayée, non seulement de citations d'an-

teurs qui font autorité, mais encore de documents historiques qu'il faudrait transcrire et expliquer. Cette tâche, je n'ai pas le temps de l'entreprendre. Du reste, en ce qui regarde la présente cause, le rapport qui a été fait de celle de *Stuart et Bowman*, me permet d'abréger considérablement. Je dois donc me borner pour le moment à renvoyer aux 2e et 3e volumes des "Décisions des tribunaux du Bas-Canada," où ce rapport a été publié. L'on y trouvera les moyens des parties et les opinions des juges qui ont eu à prononcer dans la cause, en première instance et en appel. Les réponses que je donnerai aux diverses questions qui se présentent, feront connaître quelles sont celles de ces opinions que j'adopte, et quelles sont celles que je n'adopte pas. Comme plusieurs des arguments à l'aide desquels j'ai formé mes conclusions, ont déjà été exposés dans cette cause de *Stuart et Bowman*, j'éviterai, autant que possible, de les répéter ici. (1)

(1) Vide : *Stuart and Bowman* 2 vol. L. C. R. p. 369 :—3 vol. L. C. R. p. 309.

En première instance, cette cause a été plaidée devant les honorables juges Smith, Vanfelson et Charles Mondelet. Le jugement, qui a eu l'assentiment de ces deux derniers contre l'avis du juge Smith, déclare que jusqu'à l'acte impérial de 1825, appelé ordinairement "l'Acte des Tenures," aucune partie des lois civiles anglaises n'avait été introduite en Canada.

En Cour d'Appel, elle fut plaidée devant les honorables juges Rolland, Panet et Aylwin, juges de cette cour, et devant l'honorable Dominique Mondelet, juge suppléant. Leur jugement, rendu à l'unanimité, donna gain de cause à l'appelant, Sir James Stuart, qui était alors le juge en chef de la même cour. Mais ce jugement, de fait, ne comporte pas de décision sur la question dont il s'agit ; le juge Aylwin, quant à cette question, différant *inco* de ses confrères, et surtout du juge Rolland, comme l'on peut s'en convaincre par leurs opinions rapportées dans le 3e vol. des *Déc.*, suscitée. En effet, dans le compte rendu de la cause de *Stuart et Bowman*, le juge Rolland aurait dit : "L'on comprendra donc facilement qu'individuellement je n'ai pas dû trouver de difficulté à prononcer *d'après notre droit commun* sur le titre des demandeurs. Le jugement est formulé de manière à ne pas repousser l'idée qu'il serait fondé sur un droit exceptionnel. C'est pourquoi il est prononcé à l'unanimité, quoique les juges ne soient pas tous d'accord sur cette question controversée chaque juge pouvant avoir son opinion particulière sur ce point."

Il est suivi à propos de remarquer que dans le *factum* des appelants, se trouve le passage suivant :

"1st reason" (assigned by the judgment appealed from) : "The civil laws of England have not, either by the proclamation of 1763, or by the act of the Imperial Parliament of 1774, ch. 83, been introduced into Canada."

"This proposition is in itself irrelevant, and wholly foreign to the subject in dispute in this action. It is not necessary to contend, nor has it been contended, or asserted by the plaintiffs in this action, (though it be a point on which difference of opinion has been entertained by high authorities,) that the civil law of England was introduced into Canada by the proclamation of 1763."

Il paraît en outre qu'une moitié des chefs de la déclaration dans la cause de *Stuart et Bowman*, reposait sur le droit français, et l'autre moitié sur le droit anglais. "The plaintiffs title," remarque le juge Smith, "has been alleged by various counts as subsisting under both the english and french systems of law." Ce qui ne prouve pas que les demandeurs fussent bien certains de succès, s'ils n'avaient eu à invoquer que le droit anglais.

2. Les principaux points de la discussion sont ceux-ci :

1o. Le changement de domination, a-t-il eu, par lui seul, l'effet de substituer les lois anglaises aux anciennes lois du pays ?

Ou, si ce changement n'a pas eu, par lui-même, un tel effet ;

2o. La proclamation du Roi d'Angleterre, du 7 octobre 1763, a-t-elle eu cet effet ?

Ou, si cette proclamation a été elle-même impuissante à cet égard ;

3o. La substitution de lois anglaises aux lois françaises, a-t-elle été opérée par l'ordonnance provinciale, du 17 septembre 1764 ?

Ou, si les lois anglaises n'ont pas été introduites en Canada, soit par le seul fait du changement de domination, soit par la proclamation de 1763, ou l'ordonnance de 1764 ;

4o. L'acte impérial de 1774, chap. 83, ordinairement appelé " l'acte de Québec," a-t-il eu l'effet d'introduire ces lois, ou de les conserver, (en supposant qu'elles eussent été introduites auparavant), en ce qui regarde les terres concédées en franc et commun soccage ?

5o. Enfin, quel a été, quant à ces mêmes terres, l'effet de la 8e section de l'acte impérial de 1825, chap. 59, ordinairement appelé " l'Acte des Tenures du Canada " ?

3. Sur le premier point, celui de l'effet du changement de domination ; je réponds négativement à la question posée plus haut. Et empruntant au juge en chef Hey ses propres expressions, je dis avec lui : " It is a well known and indisputable maxim of the law of nations, adopted and confirmed by the law of England, that the laws of a con-

"quered people continue in force, till they are expressly changed by the will of the conquering nation." (1).

Lewis s'exprime de même, en parlant de colonies où régnait déjà un système de lois régulier, acquises par l'Angleterre, soit par cession, soit par conquête. "The body of the english law does not obtain in dependencies so acquired.... If a territory belonging to an independent state, or being itself independent, is acquired by cession or conquest, the system of law which obtains in it at the time of the acquisition, can hardly fail to be considerably different from that of the dominant country which acquires it. In general, a country thus acquiring a dependency, is satisfied with reorganizing its local government, and modifying its public law, and is contented to leave its civil law (or *jus privatum*) unchanged. By this mode of proceeding, the dominant country secures its own dominion, and avoids the production of confusion which must inevitably ensue in any community upon a sudden change of its law of property and contracts.... (2)

"Thus Trinidad retains much of the spanish law ; Demerara, the Cape of Good Hope, and Ceylon, retain much of the dutch law ; *Lower Canada retains the french civil law according to the Coutume de Paris* ; Ste. Lucie retains the old french law as it existed when the island last belonged to France ; Mauritius retains such of the french codes as were extended to it.... Blackstone properly remarks that the common law of England does not obtain, as such, in an english dependency acquired by conquest or treaty." (3)

4. C'est là un principe fondamental du droit public anglais, qui étend sa protection pleine et entière à tous ceux qui, étant habitants d'une colonie acquise par le souverain

(1) M. Hay a été le second juge en chef de la province de Québec, sous la domination anglaise.

(2) "Essay on the government of dependencies." London, 1841, p. 202 et seq :

(3) Commentaries, vol. I. p. 108.

de la Grande Bretagne, deviennent par cela même citoyens anglais. C'est un droit sacré auquel ce souverain ne peut porter atteinte, encore bien moins un de ses généraux qui accepte une capitulation. Je n'ai jamais pu comprendre le raisonnement au moyen duquel on a quelque fois tenté de faire déduire, *de plano*, de la réponse du général Amherst à l'article 42 de la capitulation du 8 sept. 1760, la substitution des lois anglaises aux lois françaises. L'article 42, proposé par le Marquis de Vaudreuil, était en ces termes :

“ Les Français et Canadiens continueront d'être gouvernés suivant la coutume de Paris, et les lois et usages établis pour ce pays ; et ils ne pourront être assujétis à d'autres impôts qu'à ceux qui étaient établis sous la domination française.”

Le général anglais dit : “ Répondu par les articles précédents, et particulièrement par le dernier ; ” c'est-à-dire, “ ils deviennent sujets du roi.”

Voici la différence qu'il y a entre cette réponse et une réponse affirmative qui eût été donnée par le général Amherst, en disant sans réserve, comme il l'avait déjà fait relativement à d'autres articles : “ accordé.”

Une telle réponse, par ce mot pur et simple “ accordé,” eût été une promesse, un engagement solennel, obligatoire pour le roi et le parlement anglais. Ceux-ci eussent été liés, par la loi des nations, à maintenir inviolable le 42<sup>e</sup> article de la capitulation.

Le général Amherst, en répondant, “ ils deviennent sujets du roi,” n'a fait que la seule réponse qu'il pût faire, s'il ne voulait pas prendre sur lui, par un “ accordé ” solennel, d'engager l'honneur et la parole de son souverain et de son gouvernement. Le droit public anglais ne lui permettait pas de faire une autre réponse ; et ce même droit public maintenait et continuait, dans toute leur force, après la capitulation, les lois du Canada, jusqu'à ce qu'elles

fussent abrogées ou modifiées par une *autorité compétente*. Le résultat eût été le même, si l'article 42 n'eût pas été proposé.

Observons que le traité de Paris, de 1763, par lequel le Canada a été cédé à l'Angleterre, n'a rien changé à cet état de choses ; au contraire, il l'a confirmé et maintenu.

5. Voulant suivre, autant que possible, l'ordre des dates, je crois à propos de consigner ici l'opinion du procureur-général NORTON, dans sa réponse aux " Lords Commissioners for trade and plantations," du 27 juillet 1764. La question posée était celle-ci : " Whether such of the french or spanish inhabitants of *Canada*, Florida, &c., &c., as being born out of the allegiance of His Majesty, and also remain in the said countries under the stipulations of the definitive treaty (1763), are, or are not, under the legal incapacities and disabilities, put upon aliens and strangers by the laws of this kingdom in general, and particularly by the act of navigation, and the other laws made for the regulating the plantation trade."

Si, d'un côté, cette question nous fait voir qu'il y avait des personnes qui ne connaissaient pas la loi des nations, et le droit public anglais en particulier, aussi bien que le général Amherst qui avait répondu ; " ils deviennent sujets du roi ; " de l'autre côté, elle nous fait voir en même temps, en autant qu'il s'agit du Canada, l'origine des luttes incessantes que le pays a eu à subir, dans un esprit mal compris de domination, ou d'intérêt privé, ayant pour effet de méconnaître des lois civiles, dont, plus tard, on a été forcé d'avouer la supériorité sur celles que l'on voulait leur substituer. Pour justifier cette assertion, il suffit d'en appeler à la législation locale de ces dernières années, et principalement, dans le cas actuel, à l'acte précité du 10 juin 1857.

6. Que répond le procureur-général NORTON ? " I am humbly of opinion, that those subjects of the Crown of



France and Spain, who were inhabitants of Canada, Florida, and the ceded Islands in the West Indies, and continued there under the stipulations of the definitive treaty, having entitled themselves to the benefit thereof, by taking the oath of allegiance, &c., are not to be considered in the light of aliens, as incapable of enjoying, or acquiring, real property there, or transmitting it to others for their own benefit ; for, I conceive that the definitive treaty, which has had the sanction, and been approved, and confirmed, by both Houses of Parliament, meant to give, and that it has, in fact, and in law, given to the then inhabitants of those ceded countries, a permanent transmissible interest in their lands there ; and that to put a different construction upon the treaty, would dishonour the Crown, and the national faith, as it would be saying that, by the treaty, they were promised the quiet enjoyment of their property, but, by the laws, were to be immediately stripped of their estates.” (1)

7. Ainsi, ni la domination temporaire et à main armée de 1760 à 1763, ni la domination permanente, cédée par le traité de Paris, ni ce traité, et encore bien moins la capitulation, n'ont pu avoir l'effet de faire disparaître les anciennes lois du pays. La loi des nations, et le droit public anglais en particulier, répudient la proposition contraire.

8. Vient à présent, dans l'ordre que j'ai adopté, la proclamation du 7 octobre 1763. (2)

Il y a eu, à cet égard, diversité de sentiments. Sur ce point encore, je concours dans l'opinion des juges qui, dans la cause de *Stuart et Bowman*, ont soutenu que cet proclamation n'avait pas eu l'effet d'introduire les lois anglaises, (le *jus privatum*). J'adopte, sur cette question, la plupart des raisons qu'ils ont données, et qui y ont immédiatement rapport ; car il y en a d'autres dans lesquelles je ne saurais concourir.

(1) 2 Chalmers, Opinions of Eminent Lawyers pp. 364-5-6.

(2) Cette proclamation est transcrite dans les observations de Mondelet, C. Juge. 2 Dec. Bas-Canada p. 411.

Il me semble qu'on ne doit et qu'on ne peut voir, dans cette proclamation, en autant qu'il s'agit des lois anglaises, qu'une déclaration de l'intention du Roi d'en faciliter plus tard l'introduction *graduellement*, selon les circonstances, par l'entremise d'une législature provinciale, telle que celle dont l'établissement était promis par cette même proclamation ; promesse qui, évidemment, en faisait le principal objet. C'était une législature qui devait être composée de trois branches, d'un gouverneur, d'un conseil, et des représentants du peuple. Du reste, sur ce point, je ne peux mieux faire que de renvoyer à la dissertation si fortement raisonnée de M. le juge en chef Hux, celle dont j'ai déjà présenté un extrait. (1)

9. Le troisième point de la discussion a trait à l'ordonnance du 17 septembre 1764, promulguée par le gouverneur Murray, avec l'assistance et l'avis de son conseil *seulement*. (2)

Dans l'incertitude où étaient les personnes qui voulaient, à tout prix, être régies par les lois anglaises ; et c'était assez naturel, pour celles qui avaient été élevées sous le régime de ces lois ; dans l'incertitude, dis-je, où étaient ces personnes, de savoir sur quoi se fonder, pour soutenir leur prétention que les lois anglaises avaient été substituées aux lois françaises, elles invoquaient tour-à-tour, ou l'article 42<sup>e</sup> de la capitulation, auquel le général Amherst avait répondu, " ils deviennent sujets du roi," ou bien, la proclamation de 1763, ou bien encore, l'ordonnance de 1764, ou enfin, le simple fait du changement de domination.

Il n'y avait, en cela, rien qui doive surprendre. D'abord ces personnes étaient, comme bien d'autres, dans tous les temps et dans tous les lieux, facilement disposées à subir l'influence des préjugés nationaux, et de plus l'influence

(1) 1 L. C. Jurist. p. 33, 2<sup>d</sup> part.

(2) 3. L. C. Rep. p. 382.

de l'intérêt privé, influence qui n'est point celle qui fausse le moins le jugement, même chez les personnes les plus capables de bien apprécier une position quelconque, dans des circonstances données, lorsque cette influence n'existe pas. Ensuite ces mêmes personnes avaient, pour les justifier en quelque sorte, l'opinion du Baron Masères, *lorsqu'il était procureur-général de la province de Québec*. (1) Mais plus tard, après que la révolution américaine eût éclaté, Masères a, dans son *Canadian Freeholder*, publié à Londres en 1779, soutenu des principes et des règles d'interprétation légale, bien plus avouables et mieux reconnus dans le droit public, que ceux qu'il s'était efforcé de faire prévaloir à Québec.

Sur cette partie de la discussion qui se rapporte à l'effet que peut avoir eu l'ordonnance du 17 sept. 1764, je concours non seulement dans l'opinion du juge en chef Hey, mais encore dans celle exprimée par Masères lui-même dans son projet de rapport au gouverneur Carleton. Il y reconnaît que si les lois anglaises n'avaient pas été introduites antérieurement à l'ordonnance en question, cette ordonnance n'avait pu, par elle-même, avoir l'effet de les introduire.

"We (2) shall say nothing concerning the validity of your Majesty's proclamation of the 7th of October, 1763, and the high legislative authority which your Majesty has therein thought proper to exercise with respect to your Majesty's new colonies, though there are persons who think that this branch of your Majesty's royal prerogative ought rather to have been exercised in conjunction with both houses of parliament : but we should suppose that what your Majesty

(1) Voir le *projet* de son rapport au gouverneur Carleton, qui fut délivré le 27 février 1769, "but had not the good fortune," dit Masères, "to be approved by his Excellency." (Collection of several commissions and other public instruments, proceeding from His Majesty's royal authority, relating to the province of Quebec. Collected by Francis Masères, Esq., His Majesty's attorney-general in the said province. London, 1772.)

(2) Masères, pp. 24-27.

has thought fit to do in this respect by the advice of your Majesty's privy council must be legal, and consequently that the operation of the words above cited from your Majesty's said proclamation is complete and incontestable so far as the true meaning of them can be ascertained. But if your Majesty in your royal wisdom should interpret them in a different sense from that in which they have been generally understood, and should declare that they were not meant to introduce the whole body of the laws of England that were not in their nature local, but only to introduce some particular parts of them that were more immediately beneficial to your Majesty's subjects, agreeably to the sense in which they were understood by your Majesty's attorney and solicitor general in April, 1766 ; or, if your Majesty should declare that they were not meant to introduce immediately any part of the laws of England into those provinces, but only to promise and assure your Majesty's British subjects that your Majesty would, in due time and place, and by particular and express promulgations, introduce some select parts of the laws of England that were more immediately conducive to their welfare and satisfaction ; in either of these cases we beg leave to submit it to your Majesty's consideration, whether the ordinances above mentioned, of the 17th September and the 6th of November, can be deemed of sufficient validity to introduce any part of the laws of England that were not already established by your Majesty's said proclamation. Our reasons for doubting this are as follows :

“ Your majesty by your commission to general Murray, dated the 31st day of November in the 4th year of your Majesty's reign, to be governor in chief of this province, was pleased to delegate unto him a certain limited legislative authority, to be exercised by him by and with the advice and consent of your Majesty's council of the province, and of the general assembly of the freeholders and planters in the same therein directed by your Majesty to be summoned, to wit, an authority to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and

good government of the said province, not repugnant, but, as near as may be, agreeable to the laws and statutes of your Majesty's kingdom of Great Britain. But your Majesty did not in any part of the said commission delegate either this or any other legislative power to your said governor to be exercised by him with the advice and consent of the council only, without the concurrence of an assembly. Now no assembly of the freeholders and planters has hitherto been summoned; consequently all the ordinances that have hitherto been made, so far as they have a legislative tendency, have been made without any warrant or authority from your Majesty's commission to your governor, and perhaps may, upon that account, be justly contended to be null and void."

"If this be so, the words in the ordinance of the 17th of September 1764, which direct the court of King's Bench to determine all civil and criminal causes agreeably to the laws of England, and the other words of that ordinance, and of the ordinance of the 6th of November following, which purport to introduce the laws of England into this province, can have no legal operation to change the laws which were then subsisting in the country; and the ordinance of the 17th of September must be considered only as an executive act of government, erecting and constituting courts of judicature in the province for the administration of the laws in being, whatever those laws might be; and in this view it is certainly a legal and valid ordinance, because your Majesty had, by an express clause in your commission aforesaid, given your said governor full power to erect such courts with the advice and consent of the council only."

"It is true indeed that your Majesty did give a private instruction to your late governor, purporting to communicate to him a certain degree of legislative authority to be exercised by him, by and with the consent of the council only, without any assembly; to wit, *an authority to make such rules and regulations as shall appear to be necessary for the peace, order, and good government of the said province, ta-*

*king care that nothing be passed or done that shall any ways tend to affect the life, limb, or liberty of the subject, or to the imposing any duties or taxes.* But we submit it to your Majesty's consideration, whether a power of this kind can be communicated by any other instrument than letters patent under your Majesty's great seal of Great Britain, publicly read and notified to the people, to the end that the acts done by virtue of them may have a just claim to their obedience ; for otherwise they may allege that they are faithful and loyal subjects to your Majesty, and ready to pay obedience to every thing that your Majesty's self shall ordain, and likewise to every thing that shall be ordained by your Majesty's governor by virtue of powers properly communicated to him by your Majesty ; that consequently they will obey him in every thing he shall do by virtue of the powers conveyed to him in your Majesty's commission which has been publicly read to them ; but that in the things not warranted by the said commission, but said to be done in pursuance of certain private instructions that have not been made known to them, and which they are therefore uncertain whether he has received or not, they cannot presume that he acts by your Majesty's authority, and therefore are not bound to obey him. For this reason we humbly apprehend, that the private instruction before-mentioned cannot have legally conveyed to your Majesty's governor and council the legislative authority mentioned in it, small and narrow as it is."

" But secondly, if a private instruction should be deemed to be a legal method of communicating a legislative authority, yet the power conveyed to the governor and council of this province by the instruction above mentioned is much too confined an authority to warrant the general introduction of the English laws ; particularly of the criminal laws, which all affect either life, or limb, or liberty ; and the process of arrests of the body in civil suits for debt and trespass ; and the power of committing persons to prison for contempts of court committed in the presence of your Majesty's judges ; and that of granting attachments of the body for disobe-

dience or resistance to the orders of your Majesty's superior courts of judicature, when such acts of disobedience or resistance are committed out of court ; which all immediately affect the personal liberty of your Majesty's subjects in this province."

" These are the reasons upon which, we conceive, the legality of the introduction of the laws of England into this province by the provincial ordinances above-mentioned may be called in question."

" But these reasons have no relation to the other high instruments of government by which these laws may be supposed to have been introduced here, namely, the articles of capitulation in 1760, the 4th article of the definitive treaty of peace, and your Majesty's royal proclamation of the 7th of October 1763. If these instruments have introduced the laws of England, they may have a legal existence in this province, notwithstanding the want of legal authority in the two provincial ordinances above mentioned. But if your Majesty should determine that these instruments have not introduced the laws of England into this province, then, as we conceive, it will follow that the whole body of those laws has not yet been legally introduced into it, but that those parts only of the laws of England have a legal existence in this province which are contained in the acts of parliament above mentioned, which by their own import and operation, and without needing any new instrument of government to introduce them, extend to all your Majesty's dominions in America."

10. Sur les questions qui précèdent, on peut, on doit même consulter les opinions données par le procureur-général Yorke et le solliciteur-général De Grey, dans leur rapport au roi, du 14 avril 1766, et ensuite par le procureur-général Thurlow, citées par l'Honorable Juge Charles Mondelet dans la cause de *Stuart et Bowman*. (1) Ces opinions justifient ce que je viens de dire sur la non-intro-

(1) " *Déc. des Trib. du B. C.*", t. 2. pp. 408 et suiv. : aussi, *Smith, History of Canada*, t. 2. pp. 27 et suiv. contenant au long le rapport de MM. Yorke et de Grey.

duction des lois anglaises (du *jus privatum*). A ces opinions des premiers officiers en loi de la couronne, en Angleterre, j'en ajouterai une autre qui n'est pas citée dans la cause de *Stuart et Bowman*, et qui se trouve rapportée dans un écrit publié à Londres, en 1774, immédiatement après la promulgation de "l'Acte de Québec," et en défense de cet acte. (1). Je ne connais pas le nom de l'auteur de cet écrit, mais il est évident qu'il était bien au fait de toutes les questions agitées alors relativement au Canada, et qu'il a dû être dans une position à prendre une part active à la passation de l'acte Impérial. Et son opinion et les faits qu'il rapporte doivent avoir d'autant plus de poids sur la question légale qui nous occupe, qu'il est loin de se montrer exempt de préjugés sous plus d'un rapport.

"In 1765, the Lords of trade sent the following query to Sir Fletcher Norton and Sir William de Grey, then attorney and solicitor general: "Whether His Majesty's subjects, being *Roman* catholics, and residing in the countries ceded to His Majesty in America by the treaty of Paris, are not subject, in those colonies, to the incapacities, disabilities and penalties, to which Roman Catholics in this kingdom are subject by the law thereof?" To which query those great men answered on the 10th of June, "that they were not." And the advocate, attorney and solicitor general, in their joint report to the Privy Council upon the propositions of the Board of trade, presented on the 18th January 1768, state to be their opinion, "that the several acts of Parliament, which impose disabilities and penalties upon the public exercise of the Roman Catholic religion, do not extend to Canada, and that His Majesty is not by His prerogative enabled to abolish the Dean and Chapter of Quebec, nor to exempt the protestant inhabitants from

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(1) "The justice and policy of the late act of Parliament for making more effectual provision for the government of the Province of Quebec, asserted and proved; and the conduct of administration respecting that province stated and vindicated. London. Printed for J. Wilkie, at No. 71, in St. Paul's church-yard." On trouve cet écrit dans un volume de pamphlets appartenant à la bibliothèque du Parlement du Canada.



*“ paying tithes to the persons legally entitled to demand them from the Roman Catholics. (1)*

11. Les citations qui précèdent n'ont été faites que pour démontrer la proposition que, d'après les règles reçues de l'interprétation des lois, et les principes de droit qui prévalent en cette matière, la proclamation du 7 octobre 1763, n'a pas eu, et n'a pu avoir, sous le rapport de l'introduction des lois anglaises, l'effet que les défenseurs du système adopté par l'intimé se sont efforcés d'attribuer à cette proclamation ; qu'au contraire ma proposition a eu pour elle, à une époque rapprochée de la proclamation, l'assentiment des premiers officiers en loi de la couronne, en Angleterre, bien plus, l'assentiment de ceux-là mêmes qui remplissaient les fonctions de Procureur et de Solliciteur-général, Yorke et Norton, lorsque cette proclamation fut émanée, et qui, en toute probabilité, l'avaient eux-mêmes rédigée.

12. Si donc la proclamation de 1763, n'a pas eu l'effet de substituer les lois anglaises aux lois françaises, l'ordonnance de 1764 a encore bien moins pu avoir cet effet. J'en ai plus haut assigné la raison, en invoquant l'opinion du juge en chef Hey, et celle du Baron Masères, même lorsqu'il était Procureur-général de la province de Québec.

13. D'un autre côté, je dois admettre qu'il est *de fait* qu'à l'ombre de cette ordonnance de 1764, les tribunaux qu'elle avait établis, appliquaient quelquefois, dans leurs décisions, la loi civile anglaise ; ce qui paraît avoir eu lieu en matière personnelle, principalement dans ce qui se ratachait aux affaires commerciales ; mais il est également constant, (et il suffit de parcourir les registres de ces tribunaux pour s'en convaincre), qu'ils adoptaient le plus souvent en matière personnelle, et presque toujours, si ce n'est

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(1) D'après la préface du 1er volume de la collection de *Chalmers*, déjà citée, (voir pages 44, 45 et 46), il paraît que le 7 octobre 1763, Yorke était procureur-général, et Norton Solliciteur-général ; que le 10 juin 1766, Norton était en effet Procureur-général, et de Grey Solliciteur-général ; que le 14 avril 1766, Yorke était de nouveau Procureur-général, et de Grey Solliciteur-général ; que le 18 janvier 1768, de Grey était Procureur-général, et Ellis Solliciteur-général.

même toujours, en matière réelle, les anciennes lois du pays, c'est-à-dire les lois françaises, comme règles de leurs décisions.

"All disputes," dit Christie, (1) "from this time forward, between the new subjects concerning rights in land and real property, inheritance, succession to, and division of the same among coheirs, continued, as previous to the conquest, to be determined according to the ancient customs and civil laws of Canada, and by judges conversant with those laws, selected from among their own countrymen; and these also were the rules of decision in the like matters, between the old subjects of the King who had immigrated hither and settled in the province. Most of these expected, however, that in all cases wherein *they* were personally concerned, civilly or criminally, the laws of England were to apply, in conformity, as they read it, with His Majesty's proclamation, imagining also that in emigrating, they carried with them the whole code of English civil and criminal laws for their protection."

"The criminal law of England following the conqueror, as a matter of right prevailed as the proper code under which the innocence or guilt of "*British subjects*" on trial ought to be tested, and the new subjects were not long without feeling its superiority over the laws it supplanted. In all cases of personal contracts and debts of a commercial nature the English laws, it would also seem, practically ruled, but as in all civilized countries the laws which regulate such matters are nearly the same, they were cheerfully acquiesced in, and although anomalies, unavoidable in the novel and transition state in which the colony and its judicature were placed, did undoubtedly occur in the administration of civil justice occasionally, (there not being wanting those who have asserted that there was no fixed rule in administering it, justice being sometimes dealt out according

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(1) "History of the late Province of Lower Canada," Québec, 1848; vol. 1. p. 2.

to the one code, and at times according to the other, and perhaps imperfectly, in reference to either,) it seems clear that justice was intended, and in the main fairly dealt out by those entrusted with it."

14. Le témoignage de notre historien, M. Christie, n'est pas sans avoir une grande importance en cette matière. Elevé au barreau du Bas-Canada, il a été appelé, il y a déjà plusieurs années, à remplir des fonctions judiciaires ; membre de la législature durant une période de temps assez considérable, il a pris part aux luttes politiques qui distinguent particulièrement l'époque dans laquelle il s'est ainsi trouvé engagé. La nuance politique à laquelle il appartenait, était celle qui avait, du moins dans le passé, prétendu que de 1764 à 1774, les lois anglaises avaient été substituées aux lois françaises.

15. Si donc il est vrai que, de 1764 à 1774, les lois civiles anglaises ont pu quelquefois servir de règles de décision, surtout en matière commerciale, ce n'en est pas moins un fait incontestable, reconnu par M. Christie lui-même, que ce sont les anciennes lois du pays, les lois françaises, qui, durant la même période, ont été généralement administrées et mises en force, surtout dans ce qui intéressait le plus la société, le droit de propriété, par n'importe quel titre il fût créé. Si ce fait, que les registres publics ne permettent pas de révoquer en doute, atteste d'un côté la persistance et le maintien des lois françaises, il atteste en même temps que l'administration des lois civiles anglaises ne constituait qu'un *fait*, et non pas un *droit*, puisque ces lois n'avaient été introduites, ni par le changement de domination, ni par la proclamation de 1763, encore moins par l'ordonnance de 1764.

16. Quant au criminel, c'est encore un *fait* que les lois criminelles anglaises furent celles que l'on suivit dans l'intervalle de 1764 à 1774. Je me contenterai de remarquer qu'on n'y fit aucune objection ; qu'il paraît même y avoir

en une espèce d'assentiment général ; ce qui s'explique facilement par la comparaison de ces lois avec les anciennes lois criminelles françaises. Du reste, il est juste de constater ici que MM. Yorke et de Grey, tout en déclarant de la manière la plus formelle que la proclamation de 1763 n'avait pas eu l'effet de substituer les lois civiles anglaises aux lois françaises, ont néanmoins dit que cette proclamation pouvait être interprétée comme ayant eu un effet différent quant aux lois criminelles. " *This certainty and leniency, (in matters of crown law, affecting life and liberty), are the benefits intended by Your Majesty's royal proclamation as far as concerns judicature.*" Nous avons déjà vu que M. Christie s'était exprimé ainsi sur ce sujet : " *The criminal law of England following the conqueror, as a matter of right, prevailed as the proper code under which the innocence or guilt of " British Subjects", on trial, ought to be tested, and the new subjects were not long without feeling its superiority over the laws it supplanted.*"

17. Avant de passer à " l'Acte de Québec" (1774), je dois faire une autre observation. Si, par la proclamation de 1763, ou par l'ordonnance de 1764, les lois Anglaises ont été substituées aux lois Françaises, toutes ces dernières lois ont dû disparaître. On ne saurait admettre ni exception, ni terme moyen, en pareil cas. Alors, comment se fait-il que, sous le gouvernement anglais, on ait maintenu, (contre le sentiment des marchands, il est vrai,) que les droits imposés par le roi de France sur les effets de commerce importés dans la province, étaient encore exigibles en vertu des Edits de Sa Majesté Très Chrétienne ? Il y a là une contradiction manifeste. (1)

18. Le 4<sup>e</sup> point de la discussion repose sur l'Acte de Québec (1774). Sous l'autorité de cet acte, les terres en franc et commun socage ont-elles été régies par les lois anglaises ?

De ce que la coutume de Paris gouvernait le Canada, il

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(1) *Vide Masters Collection*, pp. 288-9.

ne s'ensuivait pas que le roi de France fût obligé de concéder en fief, ou en censive, toutes les terres incultes de ce pays. Je ne connais aucune loi qui l'empêchât de faire une concession sous une tenure parfaitement libre, telle que celle de franc-aleu roturier. C'est un principe incontestable que dans le droit naturel, tous les biens sont libres. Le roi d'Angleterre, après avoir succédé au roi de France, pouvait concéder en franc aleu roturier, de même qu'il pouvait concéder en fief ou en censive. Cela s'entend, si les lois anglaises n'avaient pas été substituées aux lois françaises. Car, si cette substitution eût eu lieu, ne peut-il pas se faire que le roi eût été, par cela même, astreint à ne faire de concessions des terres incultes du Canada que sous la tenure de franc et commun socage, en conséquence du statut de la 12<sup>e</sup> Charles II, chap. 24, dont la 4<sup>e</sup> section porte : " That all tenures hereafter to be created by the King's Majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements or hereditaments, of any estate of inheritance at the common law, shall be in free and common soccage, and shall be adjudged to be in free and common soccage only, &c. &c."

Mais le fait que le roi d'Angleterre a donné en ce pays des concessions en seigneuries, est une nouvelle preuve que les lois anglaises n'avaient pas été substituées aux lois françaises. Il pouvait donc également concéder sous une autre tenure, comme aurait pu le faire le roi de France. Quant aux incidents qui se rattachent à la translation de la propriété, une fois l'héritage entré dans le domaine privé, le nom de la tenure ne faisait rien à la chose, en ce sens qu'il ne pouvait par lui-même soustraire ces incidents à l'application des règles du droit municipal du pays.

19. Ceux qui ont prétendu que, sous l'autorité de l'acte de Québec, les terres en franc et commun socage devaient être régies par le droit anglais, se sont fondés sur la neuvième section de cet acte. Sur ce point, je partage l'opi-

nion des juges qui, dans la cause de *Stuart et Bowman*, ont été d'avis que, pour être intelligible et avoir quelque effet sans contredire ou nullifier d'autres parties du statut, cette section ne pouvait être interprétée que comme décrétant, par exception, que ce qui du droit français avait rapport à la tenure seigneuriale, ne s'appliquerait pas aux terres en franc et commun socage. Il me semble qu'en effet ce n'est là qu'une disposition de cette nature, n'ayant d'autre objet que d'apporter une exception à la règle générale, si bien connue, de l'ancien droit français, *nulle terre sans seigneur*, sous l'empire de laquelle toute terre était présumée assujettie au régime seigneurial, à moins qu'on ne fit apparaître d'un titre au contraire. En outre, cette disposition, on peut raisonnablement l'attribuer à la crainte dans laquelle a pu être le parlement anglais, que, sous le prétexte du maintien des "lois et coutumes du Canada" qu'il venait de confirmer par la 8e section du statut, pour "*tous les sujets canadiens de Sa Majesté en la dite province de Québec*," il ne fût peut-être possible de prétendre que toutes les terres incultes de la Couronne devaient être concédées sous la tenure seigneuriale, et que, par contrecoup, celles déjà concédées en franc et commun socage devaient être assujetties à la même tenure. Je crois que ce n'a été là qu'un surcroît de précaution qui, il est vrai, ne pouvait par lui-même faire aucun mal, mais qui me paraît avoir été adopté par suite d'une appréhension bien mal fondée. La 9e section du statut eût-elle été omise, on n'en aurait pas moins eu la faculté de continuer de faire des concessions sous une tenure entièrement libre, sans qu'il y eût eu à craindre de voir les terres ainsi concédées, déclarées assujetties à des droits seigneuriaux. Du moins, c'est ce que je pense; si au contraire, je suis dans l'erreur sur ce point, alors on a bien fait d'avoir eu recours à cette précaution.

20. D'un autre côté, il faut avouer que les mots, *rien de ce qui est contenu dans cet acte*, rendent la phraséologie de la 9e section bien défectueuse. Car, s'ils sont pris au pied

de la lettre, ils donnent à cette section un sens qui conduit à presque toutes les conséquences absurdes que l'un des juges de première instance, dans la cause de *Stuart et Bowman*, a signalées. (1)

21. La 9e section ne parle en aucune façon de tel ou tel système de lois préexistant, comme devant, exclusivement à tout autre, régir les terres en franc et commun socage. Elle ne parle que de tenure d'une certaine espèce, et de concessions qui ont pu être faites ou qui pourraient être faites à l'avenir sous cette forme, c'est-à-dire sous la tenure socagère. Si, par cela seul qu'on a fait usage de mots qui désignent en même temps une tenure connue dans le droit anglais, toutes les lois de l'Angleterre qui, là, régissent cette tenure, ont été introduites ici par la 9e section de l'acte de Québec, il faudra nécessairement, et pour la même raison, attribuer un effet semblable à la 10e section du même acte, qui permet de faire un testament "suivant les formes prescrites par les lois d'Angleterre." Si la 9e section doit être considérée comme ayant apporté à la 8e qui maintient et confirme en bloc les anciennes lois et coutumes du Canada, une modification tellement étendue qu'elle a eu l'effet, ainsi que l'intimé le prétend, d'introduire le droit anglais relativement à la propriété des terres dont il s'agit, à plus forte raison la 10e section doit-elle être considérée comme ayant produit un effet semblable, puisqu'elle donne une plus grande liberté de disposer par testament que ne donnaient nos anciennes lois, et qu'en outre elle permet de le faire sous une forme qui était inconnue à ces mêmes lois. (2) Si donc les simples mots, *franc et commun socage*, ont eu l'effet d'introduire les lois anglaises quant aux terres con-

(1) 3. L. C. Rep. p. 405.

(2) Statut impérial de 1774, section 10:

"Pourvu aussi, qu'il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles, meubles ou intérêts, dans la dite province, qui aura le droit d'aliéner les dits immeubles, meubles ou intérêts, pendant sa vie, par vente, donations, ou autrement, de les tester et léguer à sa mort par testament et acte de dernière volonté, nonobstant toutes lois, usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en la dite province; soit que tel testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre."

cédées sous cette tenure, n'y a-t-il pas la même raison de prétendre que les mots de la 10e section, *suivant les formes prescrites par les lois d'Angleterre*, ont dû avoir le même effet en matière de succession testamentaire, de manière à soumettre au régime des lois anglaises la succession de tout habitant du Canada, qui aura jugé à propos de faire un testament *suivant la forme anglaise*? Et s'il arrive que cette personne n'ait, par un tel testament, disposé que d'une partie de ses biens, il s'ensuivrait cette conséquence plus que bizarre, à savoir, qu'une partie de sa succession serait réglemantée par le droit anglais, et l'autre partie par le droit français. A-t-on jamais émis de pareilles prétentions? Si on l'a fait, ces prétentions ont-elles jamais été accueillies? Je n'en connais pas d'exemple. Cependant l'on doit admettre que le raisonnement que l'on fait dans un cas, pour soutenir la proposition de l'introduction des lois anglaises, s'applique à l'autre cas, avec autant, sinon même avec plus de force. (1)

22. Si la 9e section du statut de 1774 a eu l'effet d'introduire les lois anglaises en ce qui regarde les terres socagères, alors *tout* le corps de ces lois applicables à cette tenure, a dû par conséquent être introduit pour tout ce qui concerne les incidents du droit de propriété à ces mêmes terres. On ne pouvait donc plus disposer valablement de ces terres, les aliéner, les engager, les hypothéquer, etc., suivant "les lois et usages du Canada," c'est-à-dire suivant l'ancien droit du pays. C'est la proposition de l'intimé. Combattant cette proposition, il me sera permis d'appeler à mon secours l'autorité des deux législatures du Haut et du Bas-Canada.

Dès sa première session, en 1792, le parlement du Haut-Canada a passé un acte (chap. 1.) à l'effet de révoquer cette partie de la 8e section du statut impérial de 1774, qui portait "que dans *toutes* affaires en litiges, qui concerneront leurs propriétés et leurs droits de citoyens, ils auront recours *aux lois du Canada*, comme les maximes sur les-

(1) Stuart's Rep. pp. 75-6.



quelles elles doivent être décidées ;” (version anglaise : “ That in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same.”) Mais à peine cette révocation est-elle prononcée, que le statut du Haut-Canada ajoute : “ Provided that nothing in this act shall extend to extinguish, release or discharge, or otherwise to affect any existing right, lawful claim or incumbrance, to or upon *any lands, tenements or hereditaments* within the said province (Upper Canada), or to rescind or vacate, or otherwise to affect any contract or security already made and executed *conformably to the usages prescribed by the said laws of Canada.*” (Section 2). Puis il est statué qu’à l’avenir : “ In all matters of controversy relative to property and civil rights, resort shall be had to the *laws of England*, as the rule for the decision of the same.” (Sect. 3).

23. A peine la province de Québec est-elle divisée en deux parties distinctes, chacune avec sa législature, que la partie qui est habitée presque uniquement par une population anglaise, et dans laquelle toutes les terres sont sous la tenure de franc et commun socage, adopte *pour l’avenir* et sans effet rétroactif, le régime des lois anglaises, et reconnaît en même temps que, pour le passé, son territoire et les concessions qui y avaient été faites, de même que les incidents de la propriété, avaient été jusque là soumis aux “lois et coutumes du Canada,” c’est-à-dire à l’empire de l’ancien droit français du pays. N’est-ce pas là déclarer que la 9<sup>e</sup> section de l’acte de Québec n’avait pas eu l’effet d’assujétir au régime des lois anglaises les terres concédées en franc et commun socage ? Introduire en 1792, les lois anglaises dans le Haut-Canada ; c’est bien admettre de la manière la plus solennelle que ces lois n’y existaient pas auparavant.

24. Voyons maintenant l’autorité que nous fournit le parlement du Bas-Canada. Je ne citerai qu’un seul de ses statuts. Je choisis ce statut parce qu’il a particulièrement

rapport à la partie du pays, dans laquelle est située la terre dont il s'agit en cette cause. Il a été promulgué en 1823 (chap. 17). Son titre porte : " Acte pour ériger certains townships y mentionnés en un district inférieur qui sera appelé le district inférieur de St. François, et pour y établir des cours de judicature."

Que l'on remarque que ce nouveau district ne se compose que de townships, dans lesquels toutes les terres concédées l'ont été en franc et commun socage ; et par conséquent dans le système de l'intimé, toutes ces terres devraient être sous le régime du droit anglais.

(14e. section du statut.) " Et qu'il soit de plus statué par l'autorité susdite, que le juge de la dite cour inférieure de St. François aura pouvoir, soit en cour ou hors de cour, ou hors de termes, de procéder à l'interdiction de personnes insensées, aux élections de tutelle, curatellè, et autres avis de parenté ou amis, clôtures d'inventaires, affirmations de compte, insinuations, oppositions et levées de scellés, et autres matières de même nature, qui ne doivent souffrir aucun délai ; Et qu'il aura le même pouvoir et autorité accordés par la loi aux juges du Banc du Roi des districts de Québec ou de Montréal, ou à aucun d'eux, d'appointer un notaire, sur l'application des parties ou quelqu'autre personne convenable, pour recevoir les avis de parents ou amis et qu'il procèdera sur telle matière en la manière et forme prescrites par la loi." (1)

Ce statut dont la promulgation avait été recommandée par un message spécial du gouverneur, ne contient-il pas une reconnaissance solennelle de la Couronne et des deux autres branches de la législature ; que " les lois du Canada," c'est-à-dire notre droit commun, l'ancien droit français, celui dont il est fait mention dans la 8e section de l'acte de Québec, étendait son empire, non seulement sur la partie du pays qu'on a appelée " le Canada seigneurial," mais

(1) Voir aussi la 15e section du même statut.

encore sur tout le reste du Bas-Canada, et que par conséquent les lois civiles anglaises n'y étaient pas en force? En effet les attributions spéciales, conférées au nouveau juge par la 14e section du statut de 1823, formaient une partie assez considérable du droit français, et étaient exercées par les juges des autres districts, qui avaient, en première instance, une juridiction illimitée. Le nouvel acte, en conférant ces attributions au juge de St. François, n'établissait pas un droit nouveau pour cette partie du pays, où il devait exercer sa juridiction, mais cette juridiction ayant été, par la 2e section de l'acte, limitée aux actions personnelles "dans lesquelles le montant réclamé n'excéderait point vingt livres sterling," il était nécessaire d'attribuer spécialement à ce juge *inférieur* les pouvoirs énumérés dans la 14e section, pour qu'il en fût revêtu et pût les exercer lui-même (1.)

Il me semble que les deux actes des législatures du Haut et du Bas-Canada, que je viens de citer, suffisent par eux-mêmes pour lever tous les doutes sur la question qui nous occupe. Mais, chose assez étrange, c'est qu'il paraît, d'après le *rapport* qui a été publié de la cause de *Stuart et Bowman*, que, lorsque cette cause a été plaidée et jugée tant en Cour de Première Instance qu'en Cour d'Appel, on a paru ignorer l'existence de ces deux actes, ou les avoir perdus de vue. Le rapport, en effet, n'en contient aucune mention.

25. Je passe à présent au 5e point de la discussion. Quel

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(1) Extrait du témoignage de l'honorable M. le Juge Gale, devant un comité de la Chambre des Communes, le 15 mai 1828.

"Il y en a qui nient que les lois anglaises, excepté le droit criminel, aient jamais été légalement introduites dans le Bas-Canada, soit antérieurement au statut de 1774, ou par les dispositions de ce statut...."

"Cette dénégation est-elle simplement un sujet de conversation ordinaire, ou les Chambres ou l'Assemblée Législative vont-elles jusqu'à reconnaître cette dénégation dans leur pratique?—Dans quelques-uns des actes passés dans l'Assemblée, elle a paru considérer la loi française comme en force dans les townships."

"Voulez-vous dire des actes ou des bills?—Je veux dire des actes. Il y a en un acte en 1823, qui établissait une Cour avec une juridiction de peu d'étendue dans une certaine partie des townships, savoir, une juridiction limitée à £20; et il se trouve dans cet acte des expressions dont on pourrait conclure qu'on regardait les lois françaises comme en opération dans les townships."

a été l'effet de la 8e section du statut impérial de 1825, chap. 59, appelé ordinairement, "l'Acte des Tenures?"

Cet acte a pour titre : "Act to provide for the extinction of Feudal and Seigniorial rights and burthens on lands held *à titre de fief* and *à titre de cens* in the Province of Lower Canada ; and for the gradual conversion of those tenures into the tenure of free and common soccage, and for other purposes relating to the said Province." D'après ce titre, on devait guères s'attendre à trouver dans ce statut la 8e section. Elle y est cependant, et il faut l'interpréter.

La section est en ces termes :

" And whereas doubts have arisen whether lands granted in the said Province of Lower Canada, by His Majesty, or by any of his Royal predecessors, to be holden in free and common soccage, shall be held by the owners thereof, or will subsequently pass to other persons, according to the rules of descent and alienation in force in England, or according to such rules as were established by the ancient laws of the said Province, for the descent and alienation of land situate therein : Be it therefore declared and enacted, that all lands within the said Province of Lower Canada, which have heretofore been granted by His Majesty, or by any of his Royal predecessors, to any person or persons, their heirs and assigns, to be holden in free and common soccage, or which shall or may hereafter be so granted by His Majesty, his heirs and successors, to any person or persons, their heirs and assigns, to be holden in free and common soccage, may and shall be by such grantees, their heirs and assigns, held, granted, bargained, sold, aliened, conveyed and disposed of, and may and shall pass by descent in such manner and form, and upon and under such rules and restrictions, as are by the law of England established and in force, in reference to the grant, bargain, sale, alienation, conveyance, disposal and descent of lands holden by the like tenure,

“ therein situate, or to the dower or other rights of married  
 “ women in such lands, and not otherwise, any law, custom  
 “ or usage to the contrary in any wise notwithstanding :  
 “ Provided nevertheless, that nothing herein contained shall  
 “ extend to prevent His Majesty, with the advice and con-  
 “ sent of the Legislative Council and assembly of the Pro-  
 “ vince of Lower Canada, from making and enacting any  
 “ such laws and Statutes as may be necessary for the better  
 “ adapting the before mentioned rules of the laws of England,  
 “ or any of them, to the local circumstances and condition  
 “ of the said Province of Lower Canada, and the inhabi-  
 “ tants thereof.”

26. Sur ce point de la discussion, je concours dans l'opinion exprimée par M. le juge Rolland, et j'y renvoie. Cette disposition du statut impérial, loin de tendre à faire disparaître la confusion qu'on prétendait exister, n'était propre qu'à l'augmenter, si déjà elle existait, ou bien à la faire naître, si elle n'existait pas encore. Bien que, dans le préambule de la 8e section, il soit dit qu'il s'est élevé des doutes sur la question de savoir si les terres en franc et commun socage devaient être régies “ according to the rules of *descent* and *alienation* in force in England, or according to such rules as were established by the ancient laws of the said Province, for the *descent* and *alienation* of land situate therein,” je m'accorde à dire avec M. le juge Rolland qu'on ne saurait attribuer à cette disposition un effet rétroactif. Dans la partie *statuante*, le langage dont on s'est servi, est celui qu'on emploie ordinairement quand on dispose seulement pour l'avenir, (*may and shall*). Lorsque je réfléchis que par le passé on appliquait les anciennes lois du pays aux terres en franc et commun socage ; que cette application avait donné lieu à une infinité de transactions, et par conséquent à l'existence de droits acquis, il m'est impossible de croire qu'il soit entré dans la pensée du parlement impérial de porter une loi qui pût rétroagir sur le passé, sans du moins conserver ces droits acquis de bonne foi. C'eût été boule-

verser presque tous les titres des possesseurs de ces terres, et créer une confusion qui, sous l'opération des anciennes lois du pays, ne pouvait pas exister. Il eût fallu des termes plus formels qu'une simple assertion, dans le préambule, de l'existence de doutes ; il eût fallu une déclaration expresse que cette loi était ainsi faite pour rétroagir sur le passé, pour me convaincre que telle aurait pu être en effet l'intention de la législature impériale. Mais comme il aurait pu se faire que des efforts fussent tentés pour attribuer à cette loi un effet rétroactif, au risque de violer tous les droits acquis, nous avons vu la législature du Bas-Canada promulguer l'acte de 1829, chap. 77, (communément appelé "*Bowen's Act*") dans la vue de prévenir les inquiétudes et les alarmes que de tels efforts étaient de nature à faire naître. Que ce dernier acte ait été, ou n'ait pas été sanctionné à temps ou valablement, c'est une question qu'il n'y a plus à discuter depuis la promulgation de la loi du 10 juin dernier, (1.)

27. A ce que j'ai déjà dit du statut impérial de 1825, j'ajouterai une autre remarque. Dans la partie *statuante*, ou le dispositif de la 8e section de ce statut, il n'est parlé que de trois choses que l'on veut soumettre aux règles du droit anglais, savoir : *alienation, descent et dower or other rights of married women*. N'est-ce pas un aveu formel, de la part du parlement anglais, qui contredit, on ne peut plus fortement, l'assertion, 1o. que toutes les lois anglaises avaient été substituées aux anciennes lois du pays, soit par le seul fait du changement de domination, soit par la proclamation de 1763, soit enfin par l'ordonnance de 1764 ; 2o. que ces lois seules avaient régné de 1764 à 1774 ; 3o. que, par l'acte de Québec, elles avaient été conservées en entier pour ce qui regardait les terres concédées en franc et commun socage ? Si cette assertion eût été vraie, la 8e section du statut de 1825 serait inexplicable ; elle serait en quelque sorte un non-sens. En effet, si toutes les lois anglaises ont régi le Canada avant 1774, nos terres socagères ont dû être

(1) 20me. Vie., Ch. 45.

soumises à leur empire d'une manière aussi étendue et aussi entière, que l'étaient, en Angleterre, les terres possédées sous cette tenure, et non pas seulement sous les rapports restreints de *descent*, *dower* et *alienation*. Il a dû en être de même depuis 1774 jusqu'à 1825, si les lois anglaises supposées avoir régné en Canada avant l'Acte de Québec, ont été, par cet acte, maintenues dans leur intégralité, en autant qu'elles avaient rapport à la tenure socagère. Il me semble que, dans l'hypothèse de l'introduction des lois civiles anglaises, c'est là une conséquence qu'il faut nécessairement admettre. Alors, je le demande, comment se rendre compte de la loi de 1825 qui ne reconnaît, ou n'établit que trois cas où la tenure en franc et commun socage dans le Bas-Canada, puisse être soumise aux règles du droit anglais? Ce n'est pas à moi à répondre.

28. De plus; en déclarant, dans son préambule, que les *doutes* qui s'étaient élevés, ne portaient que sur les lois de *succession* et d'*aliénation*, (*descent and alienation*), le statut de 1825 déclarait, par cela même, qu'il n'y avait pas de doute sur la non-introduction du reste des lois anglaises relatives à la tenure en franc et commun socage, y compris même le *douaire* ou les *autres droits* de femmes mariées. Ainsi, lorsque la 8e section dit que les terres socagères *seront* (*may and shall*) assujetties, en faveur des *femmes mariées* au *douaire* du droit anglais, elle établit donc un droit nouveau pour le Bas-Canada, puisque jusque là il n'y avait pas eu de doute sur la non-existence d'un tel droit. Ceci me paraît être incontestable. Puis, lorsque l'on voit que c'est dans la même disposition, dans la même sentence et avec les mêmes termes, qu'il est dit que ces terres *seront* (*may and shall*) soumises aux règles du droit anglais, en ce qui regarde la *succession* et l'*aliénation*, il me semble tout-à-fait naturel de conclure que, même pour ces deux derniers cas, le législateur n'a entendu disposer que pour l'avenir, puisqu'il n'a point distingué entre les effets que devait avoir sa loi, selon qu'il dût s'agir, ou de *succession* et d'*aliénation*,

ou de *douaire*. Ayant voulu que l'effet fût le même dans les trois cas, et cet effet, quant au *douaire*, ne pouvant opérer que pour le futur, il s'ensuit donc que le législateur a voulu qu'il en fût de même en matière de *succession* et d'*aliénation*.

29. Bien que la question de l'introduction des lois civiles anglaises n'offre plus aujourd'hui, ainsi que je l'ai déjà fait remarquer, le même intérêt qu'elle a pu avoir autrefois ; et bien encore que je pense avoir démontré que ces lois n'ont jamais été ainsi introduites dans le Bas-Canada avant l'acte impérial de 1825, je crois néanmoins à propos d'ajouter quelque chose à ce que j'ai déjà dit sur cette question.

Personne n'a été plus en état d'expliquer le sens et la portée de la proclamation royale du 7 octobre 1763, que les hommes de loi qui remplissaient, à cette époque, en Angleterre, les charges de Procureur-général et de Solliciteur-général, *Yorke* et *Norton*. Ce sont eux qui ont dû rédiger cette proclamation ; ou, dans tous les cas, elle n'a pas dû être émanée, sans avoir été préalablement soumise à leur examen. Lorsque ces deux hommes éminents furent quelque temps après consultés sur le sens de cette proclamation, ils se sont accordés à dire qu'elle n'avait pas eu l'effet d'introduire en Canada les lois civiles anglaises. Et loin qu'aucune partie de ces lois eût été ainsi introduite, nous avons déjà vu que le Procureur-général de Grey et le Solliciteur-général Ellis avaient maintenu, en 1768, que Sa Majesté ne pouvait pas même, en vertu de sa prérogative, exempter les habitants *protestants*, en Canada, "*from paying tithes to the persons legally entitled to demand them from the ROMAN Catholics.*" C'est ce qui rend compte de l'exemption de cette obligation, qui est accordée, avec la plus grande justice, par cette disposition de l'Acte de Québec, qui porte, "*that the Clergy of the said Church (the Church of Rome) may hold, receive and enjoy their accustomed dues and rights, with respect to such persons only, as shall profess the said religion*"..... "A clause," remarque l'auteur de



l'écrit dont j'ai déjà donné un extrait, " which expressly takes away from the parish priests their *legal* title to tithes of the lands held by *protestants*, and which our great crown lawyers declared the king could not deprive them of by his prerogative."

30. L'exemption dont je parle, n'était pas absolue, c'est-à-dire, les protestants n'étaient pas relevés de l'obligation de payer la dîme que les lois françaises avaient imposée, et que les prêtres catholiques avaient le droit d'exiger. Seulement, les protestants ne devaient plus être obligés de la payer à ces derniers. Et c'était *juste*, car il y a de la tyrannie à contraindre des personnes qui n'appartiennent pas à une dénomination religieuse, à payer la dîme au clergé de cette dénomination.

Je dis que l'exemption, pour les protestants, de payer la dîme, accordée par la 5e. section de l'Acte de Québec, n'était pas une exemption absolue ; et, pour le prouver, il me suffit de transcrire ici la 6e section de cet acte, qui est ce qu'on appelle un *Proviso* : " Pourvû néanmoins qu'il sera loisible à Sa Majesté, ses héritiers et successeurs, de faire telles applications du *résidu* des dits dûs et droits accoutumés, pour l'encouragement de la religion protestante, et pour le maintien et la subsistance d'un clergé protestant dans la Province, ainsi qu'ils le jugeront, en tout temps, nécessaire et utile." (Version anglaise :) " Provided nevertheless, that it shall be lawful for His Majesty, His Heirs and Successors, to make such provision out of the *rest* of such accustomed dues and rights, for the encouragement of the protestant religion, and for the maintenance and support of a protestant clergy, within the said Province, as he or they shall, from time to time, think necessary and expedient."

Le *résidu*, le *reste* de la dîme, dont il est fait mention dans la 6e section, était ce que les protestants avaient à payer. " His Majesty," dit l'auteur de l'écrit déjà cité, en

parlant de cette clause de l'acte de Québec, " is enabled to appropriate the tithes and other dues, *which protestants were obliged to pay to the Romish clergy*, before the passing of this Act, for the encouragement of the protestant religion, as well as for the maintenance and support of a protestant clergy."

31. Il serait tout à fait absurde de prétendre que le droit à la dîme, dont il s'agit, était un droit reconnu par les lois anglaises, en supposant même que ces lois eussent été introduites en Canada, avant la promulgation de l'Acte de Québec, et que cet acte n'avait fait que conserver ce droit. C'eût bien été pour la première fois que, d'un côté, les prêtres catholiques auraient appris que les lois anglaises leur donnaient le droit d'exiger la dîme, surtout des protestants, et que, de l'autre côté, ces derniers auraient découvert que ces mêmes lois les obligeaient de payer la dîme à des prêtres catholiques. Non, le droit à la dîme, dont il s'agit, repose sur une loi française qui était en vigueur dans la Nouvelle France, lorsque ce pays fût cédé à l'Angleterre. Cette loi avait donc continué, dans toute son intégralité, jusqu'à l'acte de 1774 ; et il n'a fallu rien moins qu'un acte du parlement Impérial pour la modifier, de manière à exempter légalement de son opération une certaine classe de personnes, qui, jusque-là, avait été soumise au service de la dîme envers le clergé catholique, par cela seul que cette loi française avait continué d'exister.

Pour l'autre classe des sujets de Sa Majesté, cette même loi était, non rétablie, mais maintenue en vigueur, comme ayant toujours régné jusqu'à cette modification ; modification qui proclame hautement la continuation de l'existence de cette loi. Or la loi en question ne formait qu'une *partie* des " lois du Canada " dont il est parlé dans la 8e section de l'Acte de Québec. Quelles étaient donc les *autres parties* de ces mêmes lois, qui, assurément, devaient être pour le moins sur le même pied, aux yeux du parlement anglais, que cette loi relative à la dîme, si ce ne sont toutes les au-

tres lois françaises, qui réglaient les droits civils des habitants Canadiens ? Si l'une de ces lois a continué d'être en vigueur jusqu'à l'acte de 1774, (et nous avons dans cet acte même, la déclaration solennelle qu'il en a été ainsi), comment peut-on soutenir qu'il n'en a pas été de même des autres de ces lois ?

32. Un autre moyen invoqué à l'appui du système de l'intimé, reste à examiner. C'est le dernier auquel on a eu recours, sans doute parce qu'il est si faible qu'il peut à peine soutenir la discussion. Avant de l'examiner néanmoins, je ferai remarquer que l'acte impérial de 1774, en parlant des lois qui doivent servir de règles de décision en matière civile, ne fait usage, pour désigner ces lois, que des mots suivants : "*LOIS ET COUTUME DU CANADA*," (section 8). Depuis la promulgation de cet acte, juges et justiciables ont toujours bonnement cru que ces mots, *lois et coutumes du Canada*, signifiaient les lois civiles françaises qui avaient gouverné ce pays. Eh bien, ainsi qu'on va le voir bientôt, il paraît que ça été là une grosse erreur.

Le moyen dont il s'agit consiste à dire que, si jusqu'à 1774 il y a eu des doutes sur la question de la substitution des lois civiles anglaises aux lois françaises, la 4e section de l'Acte de Québec a fait disparaître tous ces doutes, et a proclamé que cette substitution avait réellement eu lieu. C'est bien ; mais on demandera tout naturellement : si l'acte a eu cet effet, c'est sans doute parce qu'il a déclaré en termes exprès que les loi anglaises avaient été valablement, ou devaient être censées avoir été valablement introduites, soit par la capitulation, soit par la proclamation de 1763, ou par l'ordonnance de 1764, ou enfin par le fait seul qu'une partie de ces lois avait été plus ou moins suivie en Canada depuis le changement de souveraineté ? Eh bien ce n'est pas cela, puisque la 4e section du statut ne dit rien de la sorte. Que dit-elle donc, cette 4e section ? Sur quoi donc peut être fondée cette prétention de l'intimé ? Le voici. La 4e section porte que proclamation, commissions et ordonnances (toutes choses qui avaient vu le jour dans ce temps de malaise et

de confusion,) (1) seront *infirmées, révoquées et annulées*, à compter du 1er mai 1775; et de cette circonstance, l'on se croit autorisé à conclure, sans se mettre en frais de prouver autrement l'introduction des lois anglaises, que ces lois ont dû nécessairement avoir été introduites, et avoir régné *légalement* durant la période en question, et ce à l'exclusion de tout autre système de lois, c'est-à-dire des lois françaises. Supposons pour le moment qu'il en ait été ainsi : alors, dans cette hypothèse, il faut admettre de toute nécessité une autre conséquence : c'est qu'il n'y avait plus de lois françaises régnant dans le pays durant la même période. Il a bien continué d'y avoir des "lois et coutumes du Canada;" c'est le langage de l'Acte de Québec (sect. 8); mais ces "lois et coutumes," qui formaient alors le code canadien, ne pouvaient être, dans le système de l'intimé, autres que les lois civiles anglaises. Cela paraît être de la dernière évidence. En effet, lorsque la 8e section parle des "lois et coutumes du Canada," elle ne fait mention, nommément, ni de lois *françaises* ni de lois *anglaises*, ni d'un système particulier de lois qu'elle veut supprimer, ni d'un autre système particulier de lois qu'elle entend substituer au premier, ni du fait que tel ou tel système particulier a été administré durant la période dont il s'agit. Rien de tout cela. En parlant des "lois et coutumes du Canada," elle parle d'un système de lois civiles comme *existant dans ce moment là même* (1774), système qu'elle reconnaît, qu'elle maintient, qu'elle confirme, sous la désignation pure et simple des "lois et coutumes du Canada." Or, selon les prétentions de l'intimé, par ces mots "lois et coutumes du Canada," le législateur de 1774 ne peut être censé avoir eu en vue que les lois civiles anglaises comme formant alors les dites "lois et coutumes." Dans la manière de voir et de raisonner de ceux qui soutiennent le système de l'intimé, c'est là la conséquence nécessaire et logique de la propo-

(1) Le solliciteur-général Wedderburne a dit quelque part : "After the treaty of peace, a government succeeded which was neither military or civil, and it is not surprising that the Canadians should have often expressed a desire to return to a pure military government, which they had found to be less oppressive."

sition que, durant la période en question, les lois anglaises avaient été *légalement* substituées aux anciennes lois civiles du Canada. Mais cette conséquence en entraîne une autre que les partisans du même système ne peuvent éviter d'admettre : c'est que, dans ce cas, l'Acte de Québec doit être censé, non pas avoir maintenu, encore moins avoir *rétabli* (s'ils préfèrent cette dernière expression), ces anciennes lois du Canada, mais bien avoir continué et perpétué le prétendu règne des lois anglaises. Personne, cependant, ne s'en était le moins douté jusqu'au moment où l'on nous a fait part de ce nouvel argument, de cette nouvelle découverte. Il faut avouer que législateurs, plaideurs et juges sont réellement à prendre en pitié, puisque depuis bientôt un siècle, ils ont tour-à-tour législaté, plaidé et jugé, comme si les "lois et coutumes du Canada," dont il est fait mention dans le statut impérial de 1774, étaient les lois françaises, et non les lois anglaises.

33. Si j'ai eu recours à la 8e section de l'Acte de Québec, c'est afin de mieux démontrer toute la futilité de l'argument que l'intimé cherche à tirer de la 4e section, pour soutenir son système de l'introduction *antérieure* des lois anglaises. En effet, s'il est vrai que, depuis le changement de souveraineté, ces lois aient été les seules qui aient régi, ou qui aient dû régir le Canada, il est évident que l'intimé n'aurait dû attacher aucune importance à cette partie de la 4e section du statut, qui *infirme, révoque et déclare nulles*, la proclamation de 1763, les ordonnances du gouverneur en conseil, et les commissions des juges et autres officiers publics.

Deux choses encore à remarquer. La première, c'est que ce système repousse celui qui attribue à la capitulation l'effet d'avoir substitué les lois civiles anglaises aux lois françaises ; la deuxième, c'est que, si la capitulation avait eu réellement cet effet, la proclamation de 1763 et l'ordonnance de 1764 seraient sans force ou sans poids à cet égard, puisqu'on ne pourrait plus dire qu'elles ont eu l'effet

d'introduire ce qui était déjà introduit depuis trois ou quatre ans auparavant, et avait une existence indépendante d'elles. Ainsi le fait de leur révocation par l'acte de 1774 serait de même sans force et sans poids dans cette discussion.

34. Je viens maintenant à l'autre système, celui de l'existence et du maintien des lois françaises.

Il est facile d'expliquer la 4e section de l'Acte de Québec, et de démontrer qu'on ne saurait déduire des mots *infirmar*, *révoquer*, et *annuler*, qui s'y trouvent, une reconnaissance de l'introduction antérieure des lois civiles anglaises ; reconnaissance qui, du reste, serait hautement contredite par la 8e section, puisque cette section, par les mots "lois et coutumes du Canada" comme existant alors, n'a voulu parler et n'a en effet parlé que des lois françaises.

D'abord, quant à la proclamation de 1763 ; il est évident qu'il était à propos de *l'infirmar* ou *révoquer*, puisqu'on ne jugeait pas convenable de donner suite à la promesse qui y était contenue, celle de convoquer une législature dont l'une des branches eût été élective. Si cette proclamation, toute valable qu'elle pût être, n'a pas eu par elle-même l'effet d'introduire les lois anglaises, il me semble qu'il serait absurde de prétendre que du fait de sa *révocation*, l'on doive déduire une reconnaissance de cette même introduction, c'est-à-dire, d'une chose qui n'aurait jamais eu d'existence.

Il en est de même de la *révocation* ou *infirmation* des *commissions* des juges et de quelques autres officiers publics. Je crois qu'il faudrait un effort surhumain pour chercher à déduire de la simple *révocation* de ces commissions, la reconnaissance d'un système de lois qui n'aurait jamais existé, et qui du reste, eût-il existé, aurait été tout-à-fait indépendant de ces commissions.

Ainsi, quant à la proclamation de 1763 et aux commissions, du moins en ce que celles-ci pouvaient avoir de va-

lable, il y avait lieu, puisqu'on ne voulait plus les laisser subsister, à *révocation* ou à *infirmation*. Ce sont là les mots du statut, qui sont applicables à ces documents, considérés sous le rapport de leur validité. S'il y avait dans les commissions quelque chose qui fût *nul*, le mot *annuler* ou *déclarer nul* du statut pouvait s'y appliquer *pro tanto*.

Quant aux ordonnances du gouverneur en conseil, elles ne sont pas énumérées dans l'acte de 1774, pas plus que ne le sont les commissions. Il aurait bien pu se faire que quelques unes de ces ordonnances n'eussent pas excédé les attributions de ceux qui les avaient décrétées, ou qu'elles les eussent excédées en partie seulement. Dans le premier cas, il y avait lieu à "révocation ;" dans le second, à "déclarer nul" *pro tanto*. On ne déclare pas *nul* ce qu'on reconnaît en même temps avoir toujours été *valable*. Dans ce dernier cas, on *abroge*, on *révoque*. Puisque le statut s'est servi des mots *déclarer nul*, c'est qu'il y avait, ou dans les ordonnances, ou dans les commissions, quelque nullité. Par exemple, l'une de ces ordonnances pouvait être valable ou considérée l'être sous un rapport, et ne l'être pas sous un autre. C'est ce que Masères dit lui-même de l'ordonnance de 1764, dans le cas où la proclamation de 1763 n'aurait pas eu, par elle-même, l'effet d'introduire les lois anglaises. Si la proclamation, dit-il, n'a pas eu cet effet, l'ordonnance n'a pu l'avoir. Ainsi, dans l'hypothèse par lui posée, il regardait une partie de cette ordonnance comme *nulle*, celle qui enjoignait aux juges de faire, *autant que possible*, l'application des lois anglaises. Mais sous d'autres rapports il regardait cette ordonnance comme valable. Dans ce cas, ajoutait-il, "the ordinance of the 17th september must be considered only as an executive act of government, erecting and constituting courts of judicature in the province for the administration of the laws in being, *whatever those laws might be* ; and in this view, it is certainly a legal and valid ordinance, because Your Majesty had, by an express clause in your commission

aforesaid, given your said governor full power to erect such courts with the advice and consent of the council only."

Si donc il y avait lieu d'appliquer à une partie de cette ordonnance le mot *révoquer* du statut de 1774, il y avait aussi lieu d'appliquer à l'autre partie les mots *déclarer nulle* du même statut, non seulement d'après l'opinion de Massères dans l'hypothèse qu'il avait posée de la non-introduction des lois civiles anglaises par la proclamation de 1763, mais encore bien plus d'après l'opinion des officiers en loi de la couronne en Angleterre, qui avaient maintenu que la proclamation n'avait pu avoir l'effet d'introduire ces lois. L'on avait donc raison de *déclarer nul* un acte qui n'était pas valable. Mais ne serait-il pas plus qu'étrange qu'on pût faire déduire de cette déclaration de nullité, la reconnaissance de l'introduction antérieure des lois anglaises par la seule force de l'ordonnance ?

35. Enfin je me résume, en disant que jusqu'à la promulgation de l'acte impérial de 1825, chap. 59 (l'Acte des Tenures), le seul régime légal auquel les terres en franc et commun socage dans le Bas-Canada ont pu être assujetties, a été celui des anciennes lois du pays, et non celui des lois anglaises ; qu'en ce qui regarde la disposition de l'acte des tenures, relative à ce sujet, cette disposition limitée à trois cas seulement, n'a pas eu d'effet rétroactif, n'ayant pu opérer que pour l'avenir.

36. Je termine en citant l'opinion de M. James Stephen, conseil du département colonial. On la trouve dans le témoignage qu'il a donné, le 24 juin 1828, devant le comité de la chambre des communes, chargé de faire une enquête sur les affaires du Canada (1)

What, in your opinion, would be the law which in Lower Canada would regulate the inheritance of land held

(1) Report from the select committee on the civil government of Canada, ordered by the house of Commons to be printed, 22 July 1828.

Quebec : reprinted by order of the house of assembly of Lower Canada, 1829. pp. 241 and 243 ;



in free and common soccage ; if an owner of such land dies without a will, leaving children, how would it be distributed among them?—The question, I presume, refers to the state of law as it stood before the enactment of the Canada Tenures Act, 6 Geo. IV. c. 59. The law since that statute is quite clear. My opinion is, that before the enactment of the Canada Tenures Act, lands held in free and common soccage in Lower Canada would have descended in the same manner, and according to the same rules, as seigneuries holden of the Crown. The grounds of that opinion are, that the words, “ free and common soccage,” in their proper and legal sense, are always used in contradistinction to the ancient tenures in chivalry. The essential quality of a free and common soccage tenure is, that the services to be rendered by the tenant are definite and certain. In tenures in chivalry they were fluctuating, and depended on many accidental events. Such is the case at this day with the feudal tenures subsisting in Lower Canada. Therefore the provision in the statute of 1791, that lands in Lower Canada might be granted in free and common soccage to those who should desire it, meant, as I conceive, only that the lands should be holden, not upon those varying services which the ancient feudal tenures of the province would have imposed upon the tenants, but by services fixed and certain. The policy of this enactment was obviously to promote cultivation and improvements, and to relieve the agriculturist. What is essential to that end is enacted, and nothing more. The rule of law established by the act of 1774, that in all matters of civil right resort should be had to the laws of Canada, was invaded so far, and only so far, as was necessary for giving effect to this general policy. The departure from the ancient code was precisely co-extensive with, and limited by, the motives which required it.

You are probably aware that subsequent to the enactment of that law the courts of justice in Canada, and the people

in Canda, both seem to have concurred that the old French law should be applicable, in all its parts, to those lands that had been granted in free and common soccage, and those lands have therefore descended from that time to the present according to the principles of the old french law. Does it occur to you that that circumstance of the courts of justice having governed themselves upon the principles of french law, does not give validity to those titles which have been thus conveyed ?—My own opinion is, that the courts were right in those decisions. And at present the only doubt is, as to the effect of the Canada Tenures Act upon the question. That act recites that doubts have arisen whether lands granted in the province of Lower Canada in free and common soccage will be held and alienated, and will descend according to the Canadian or to the English law ; and proceeds to enact that such lands *may and shall pass*, by conveyance or descent, according to the law of England. But the statute does not contain any retrospective language. I suppose the legislature to have meant to legislate only for the future, leaving the past to be regulated by judicial decisions.

In those colonies where the Dutch law and different foreign laws exist, do they exist concurrently with English law ?—No ; all lands in Trinidad are holden under Spanish law ; and in Demerara and the Cape under Dutch law. This applies even to lands granted by the King of England.

37. Avant la promulgation de l'acte impérial de 1825, la question dont il s'agit a été soulevée directement par une exception péremptoire dans une cause de dame M. A. Tarieu de Lanaudière, veuve Baby, contre les héritiers de son mari. Le contrat de mariage contenait stipulation de communauté de biens, avec, de plus, une clause d'ameublissement. Durant cette communauté, M. Baby avait obtenu de la couronne la concession de plusieurs terres en franc et commun socage. Sa veuve, prétendant que ces terres étaient tombées dans la communauté, en réclamait

la moitié. Le moyen d'exception des défendeurs était que  
 " les dites terres ayant été ainsi données par Sa Majesté le  
 " Roi au dit François Baby *in free and common socage*,  
 " icelles n'étaient pas tombées en la communauté d'entre  
 " la dite dame demanderesse et le dit défunt sieur Baby,  
 " mais que suivant les lois d'Angleterre en force à cet égard  
 " en cette province, les dites terres étaient demeurées pro-  
 " pres au dit François Baby en son vivant, et étaient de-  
 " meurées depuis son décès et étaient et demeureraient en-  
 " core en la succession du dit défunt."

Cette cause fut jugée, le 8 octobre 1824, par l'ancienne Cour du Banc du Roi du district de Québec (1). Le jugement déclare que les terres en question sont tombées dans la communauté, et en ordonne le partage entre madame Baby et ses enfants.

38. La même question a été de nouveau soulevée devant le même tribunal dans une cause de *Paterson et McCallum* (2), mais c'était après la promulgation de l'acte impérial de 1825. Dans cette cause, il s'agissait d'une *hypothèque générale* résultant d'une obligation notariée du 27 novembre 1816. Il fut décidé que cette hypothèque frappait les terres socagères. C'était, comme dans la cause de la famille Baby, déclarer qu'en 1816, ces terres étaient soumises au régime des lois françaises, et, de plus, que l'acte impérial de 1825, ne devait pas avoir un effet rétroactif. Mais sur appel à l'ancienne cour provinciale d'appel, le juge en chef Reid infirma la décision de la cour de Québec, regardant l'acte impérial de 1825 comme un acte déclaratoire. (3) Il déclare cependant, après avoir fait allusion aux doutes que l'Acte de Québec avait créés, que les anciennes lois du Canada avaient, jusqu'à la passation de l'acte impérial de 1825, été appliquées aux terres en franc et commun socage. Le jugement de la

(1) Présents : Le juge en chef Sewell, et les juges Kerr, Perrault et Bowen.

(2) *Stuart's Reports* p. 429.

(3) *Stuart's Reports* pp. 434-436.

cour d'appel dans la cause de *Paterson* et *McCallum* est du 17 novembre 1830. (1)

DUVAL, Justice :—The chief Justice has entered into such minute details that I do not consider it necessary to do more than state a few general principles of law, which I may say, at this day, are not questioned.

Chitty, in his *Treatise on the Law of the Prerogative of the Crown*, p. 30, says, " until the laws of a country thus acquired, (by conquest or treaty) are changed by the new sovereign, they still continue in force ; as observed by Lord Mansfield, the absurd exception as to an infidel country, maintained in Calvin's case, shows the universality and antiquity of the maxim." " We find the same opinion expressed by the greatest names that have adorned the english bench—Lords Hardwicke, Mansfield, Thurlow, Ch. J. DeGrey, indeed all the great constitutional lawyers of England have so expressed themselves I here refer to the opinions collected in Cavendish's debates in the house of commons on the Canada bill in 1774, also to the opinion given by Mr. Stephen before a committee of the house of commons in 1827, on the very question we are now deciding. Mr. Faribault of Quebec, has a copy of an opinion given by lord Thurlow, as attorney general, in which the same principle is strongly insisted upon. In the 30th volume of the State Trials, will be found a most able, and in my opinion, conclusive argument of Mr. Nolan, as counsel in the case of general Picton. The question will be found most ably treated by Baron Masères in his collection of commissions and public instruments relating to the province of Quebec.

(1) Extrait de la " Gazette de Québec " (Neilson), du 3 février 1831 :

" Hier au soir, dans l'assemblée, il s'éleva des débats au sujet de la révision de nos lois ; et M. Peck (avocat) des townships déclara de la part de ses constituants, qu'ils ne désiraient nullement avoir les lois anglaises, et qu'ils ne les avaient jamais demandées. Il qualifia ces lois d'injustes sous le rapport de la primogéniture, d'onéreuses dans les aliénations, et dit qu'elles étaient ignorées, et qu'on ne les avait jamais regardées comme étant en force.

Merlin in the 7th vol. of his *Questions de Droit*, p. 258, says " c'est un principe de droit public que le peuple conquis, en ce qui concerne les lois privés, et nommément celles relatives aux successions, continue d'être régi par les anciens statuts, jusqu'à ce que le conquérant lui ait donné une autre législation.

Story in his commentaries on the Constitution of the U. S. vol. 1., p. 133, speaking of conquered and ceded countries which have laws of their own, says, " Until new laws are promulgated, the old laws and customs of the country remain in full force."

To the above, the opinion of several writers on international law might be added : but those cited suffice to show that the rule laid down is that recognized by the Courts of Justice in England, France and the United States.

Let us now see how the rule was understood and acted upon in Canada, immediately after the conquest and up to the time of the passing of the Imperial Statute, commonly called the Canada Tenures Act.

Lands held in free and common soccage were seized, sold by the sheriff, and the moneys arising from such sale distributed by the courts according to the old laws ; the English mortgage, the English statute of distributions were not even mentioned.

The question was raised in Quebec in 1824 before the Court of King's Bench in the case of Delanaudière vs. Baby, *et al.*, and the opinion of the Court was unanimous in declaring that lands held in free and common soccage were subject to the old laws of the country and not to the english laws.

Moreover, as applied to Canada, the proposition is an absurdity too glaring to be overlooked. How could you

apply the laws of England to lands held in *fief* and *seigneurie* ? How could the relations of *seigneur* and *censitaire* be maintained according to English law ? The introduction of the laws of England into Canada must necessarily have been followed by an act of spoliation either of the *seigneur* or of the *censitaire*, perhaps of both, unless the authority of the imperial parliament had intervened, and legislated specially for the numerous class of cases existing, and to which the laws of England could not, by any possibility, be made applicable.

Further, the common law courts of England require the assistance of a Court of equity. In many cases they cannot afford the relief that is required. Take for instance, trust-deeds, marriage settlements, estates-tail, the statute *de donis*, the statute of uses, the administration of minor's property and the care of his person, a bill of discovery, demanded to compel specific performance ; in all these cases a Court of equity alone can give the relief the party desires. Did any lawyer or statesman ever think of having such a court established in Canada, or of vesting the powers of a Court of equity in one of our own courts ? And why not ? Simply because the principle we are now laying down, was publicly acknowledged and acted upon throughout Lower Canada.

Having thus established that the laws of England were not introduced into Canada by the conquest, I shall here proceed to show they were not introduced by treaty.

The answer given by the commander of the british forces, at the time of the capitulation " They become british subjects," so often referred to, in support of the assertion that the laws of England had been introduced into Canada, proves the very contrary. They became british subjects, and consequently subject to and protected by those principles of constitutional law, which the laws of England recognize. I have shewn above what these are.

The plaintiff next contends that whatever may be said on the question above discussed, the royal proclamation of the 7th of Oct., 1763, has set the question at rest. The legality of this proclamation was questioned before the court of K. B. in England, in the well known case of *Campbell vs. Hall*, 1 Cowper's Rep. 204, and judgment was given for the plaintiff, that is, against the legality of the proclamation.

Baron Masères, in the volume above referred to, has stated several objections to this proclamation. One is, that it was not issued under the great seal. In the opinion of every well read Constitutional Lawyer, who will ever bear in mind, the principle,—the king can do no wrong,—this objection must be held conclusive against the legality of the proclamation. Wherever the constitution of England has conferred power, there it has imposed responsibility, and in this instance, in the absence of the great seal, on whom would rest the responsibility? and yet, it must be admitted the altering of the laws of a country, the imposing on the inhabitants laws written in a language they did not speak and did not understand, was no trifling matter, but, on the contrary, called for all the security and protection which a British subject has a right to claim.

Then comes the ordinance of the Governor,—On this, Baron Masères remarks the Governor had not followed his instructions, and therefore the ordinance was not legal. In truth, the inhabitants never yielded obedience to it. In their transactions, some were guided by the old Laws, others by the laws of England—in all probability, each man followed the laws he considered most favorable to his own claims—and how could it be otherwise, when the judges were told to administer justice according to law and equity, and, as *near as may be*, according to the laws of England,—was this not introducing a most arbitrary rule, and giving each Judge the power of deciding cases according to the

caprice of the moment, without the least responsibility. Such a power is unconstitutional, neither king nor governor could confer it.

I will remark there is here a strange inconsistency on the part of those who uphold the legality of this proclamation. If the laws of England were introduced here by the conquest or by treaty, what right had the king subsequently to repeal them and introduce a new rule. The Imperial Parliament alone could do it.

I shall say nothing of the Canada Tenures Act, as the remarks of the Chief Justice are conclusive.

I close these remarks by referring to the opinion I gave in answer to the seigniorial questions.

AYLWIN, Justice :—A question of importance presents itself in the present case, as to the existence of *douaire coutumier*, with respect to lands held under the tenure of free and common soccage. The action is a petitory action.

The plea sets up a claim for customary dower on one half of the property in dispute.

I differ from the majority of the Court, and think that the *douaire* of the French law is an impossibility under this tenure. The tenure being an Anglo-Saxon one, repels the supposition of the customary dower of the Custom of Paris existing under it. But apart from this, there are declarations and provisions of a legislative character, such as to show that the *douaire coutumier* could not exist as to township lands. To begin with the conquest, upon the capitulation of the French at Montreal, a demand was made on the British Commander that the French laws should be continued. The answer was that the inhabitants of the Colony became British subjects.

After the conquest, military tribunals were established which decided cases in civil and criminal matters accor-



ding to equity and good conscience, and seemed to give general satisfaction, and many were of opinion that these Courts of a military character were the best we ever had. They lasted about four years when civil institutions became necessary. Thereupon, the King's proclamation of 1763 was issued, inviting settlers, that is British subjects from New England and from home, and assuring them the country should be governed as nearly as possible by English laws. General Murray received instructions to summon an assembly as soon as possible. The ordinance of 17th September, 1764, created civil and criminal Courts, and, be it remarked, at the time of the conquest, French Courts and the French mode of proceeding, disappeared for ever. Under this ordinance the Court of King's Bench, also the Court of Common Pleas were established, both from similar Courts in England, the one to decide according to English law, and the other as nearly as possible to the laws of England. It was found necessary in course of time to modify these laws which were found to be inapplicable and expensive. The Government of Great Britain being desirous of doing right, passed the Act 14 Geo. III., c. 87, of the Imperial Parliament. This Act recited the proclamations and ordinances, and commissions relative to the civil government and administration of justice, thereby giving them a legislative sanction if they needed it, which I don't believe; but respectively they were to cease, new provisions being made for the future. Hence it is that from the first establishment of civil Government in the Province up to the present hour, we have the English criminal law in the Province.

With reference to soccage lands, there is a provision in the 9th section "that nothing in this Act contained, shall extend, or be construed to extend, to any lands that have been granted by His Majesty, &c., to be holden in free and common soccage." This is said to be unmeaning, and contrary to the words of the statute. The words mean no more than the assertion that the law of real property in Canada, as to

soccage lands, should *continue* to be the law of England, not to introduce it, for it was in force before. The next Act worthy to be mentioned is the Act of 1791, the 31st Geo. III., c. 31, which made provisions for the province of Upper Canada, which was settled by people of British descent and origin. In plain terms their laws were to be the laws of England; lands were to be granted in free and common soccage, and not *en fief* or *en roture*. But there was a proviso that when lands should be granted in Lower Canada, where the grantee should desire them to be granted in free and common soccage they should be so granted subject to any alterations that might prospectively be effected by legislative enactments. No alterations were made. It stood as it then was; there being often doubt as to the extent of the soccage tenure, as to whether it had all the consequences of the English law, or was restricted to descent, alienation and dower. I would here refer to Smith's History of Canada, a very useful book, which contains in vol. 1, pp. 42 et seq., information respecting a report of the Governor and Council on the Judicature of the province of a very interesting nature, of date August 28th, 1767.

#### ABSTRACT OF THE REPORT.

“ 1. Whether any and what defects are now subsisting in the present state of Judicature in Quebec.

2. Whether the Canadians are, or think themselves aggrieved, according to the present administration of justice therein; and in what respects, together with our opinion of any alterations or amendments that we can propose for the general benefit of the province, and that they be transmitted in form of ordinances, but not passed, by the Governor, Chief Justice and Attorney General. It they differ, different opinions, with reasons of such differences.

They then represented, that the laws of England were generally thought to be in force.

The commission of the Chief Justice refers to them. He was to decide according to the laws and Customs of England. And the laws, ordinances, rules, and regulations of your Majesty's Province of Quebec, hereafter in that behalf to us ordained and made. That the Ordinance of the 17th of September, 1764, set forth and erected a Superior Court of King's Bench, an Inferior Court of Common Pleas to decide in all causes above £10. Appeals to King's Bench in all above £20. Judges of this Court are to determine, according to equity, regarding Laws of England and ordinances of the province, under £5, before a single Justice; above £5, and under £10, before a single Justice, or others, at weekly or Quarter sessions.

Then the report sets forth the Ordinance of the 6th of November, 1764; on which it is observed: That all the lands in the province, whose owners died since the 10th. of August, 1765, *are subject to English Law of Inheritance, Custom of Dower, Rules of Forfeitures, Escheat.*

These Ordinances have been transmitted, and never disallowed. Canadian laws since supposed to be abolished, and Judges conceive themselves bound to proceed according to the English laws.

Besides, there are public instruments in support of the supposition: Statute of I. Elizabeth, chap. 1., abolishing the authority of the Bishop of Rome; *vide* fol. 16, 17, 24, 27. This clearly extends to after acquisitions of the Crown. Statute 15 Car. II, chap. 7, fol. 7; Statutes 7 and 8 William III., chap. 22.

We suppose other Acts of Trade, less positive in terms, extend also. Hence the Governor's commission directs him to take the oath prescribed for Plantation Governors relating to Trade. And the commissioners of the customs have appointed a Collector at Quebec to carry them into execution. They also understand Statute of XII. Anne, Statute 2, chap.

10, for preserving ships stranded ; and the 4th Geo. I., chap. 12, making it perpetual. The Attorney and Solicitor General in June, 1767, gave an opinion to the Board of Trade, that it extends to the plantations ; and this opinion is transmitted to the governor of Quebec. These before the conquest of Quebec. There are other Statutes passed since as—

4 Geo. III., chap. 2. continuing that part of 8 Geo. I., concerning importation of naval stores. A copy of this is sent to the Collector of Quebec.

4 Geo. III., chap. 19—An Act for importing Salt, &c.

4 Geo. III., chap. 15—for granting duties.

Besides these Statutes, there is a series of public instruments for introducing laws of England :

The Articles of capitulation in 1760 ; vide articles 42, 27, 30.

The Treaty of Peace of 10th of February, 1763, article 4 : That canadians are to have Romish Religion, as far as laws of England permit.

The proclamation of October, 1763 ; upon which they observe :—The British subjects in the Colony understand English Laws to be thereby introduced, and not the municipal laws of a conquered people continued. That they emigrated on this confidence.

The late Governor so understood it, who, by the ordinance of September, 1764, did not mean to overturn all the Canada laws, but to erect Courts for Exercised English Law, supposed to be already introduced.

The Lords of Trade understood it so ; for in the 7th and last articles of their Report of 2nd September, 1765, upon memorials complaining of the ordinances of the Governor and council, proposes : That in all cases where rights and

claims are founded on events prior to the conquest of Canada, the several Courts should be governed in their proceedings by the French usages and customs, which have heretofore prevailed in respect to such property. It is clear, then, that if upon events posterior to that conquest, then the Courts are to be governed by English Laws.

We know that the Attorney and Solicitor General, in April 1766, understood the proclamation in a more confined sense, as introductive of only some fewer parts of the law of England, particularly beneficial to English subjects, and not of the whole body of the laws. This they took to be the purport of the word in the proclamation—the *enjoyment* of the benefit of the laws of England; and they were of opinion that the criminal laws, were almost the only laws that came under that description, and that the laws of Descent, Alienations, Settlements, Incumbrances, and Distribution, were not comprehended under it. Your Majesty must determine, Bracton says: *cujus est condere ejus est interpretare*. We lay public instruments before you to judge upon.

The next evidence of introduction of English laws is: General Murray's Commission in 1764, to be Vice-Admiral. By this the Laws of English Court of Admiralty take place of French laws and customs. This commission as Governor, and the instructions in the same year.

Not the least intimation of any saving of any part of the Laws of England. It seems as if the Capitulation and Treaty of Peace was deemed to be notice enough of introducing English laws with respect to religion; especially as they continued in the country and took the oaths, when they had eighteen months to withdraw.

Those are the public instruments for evidences of introduction of English Law; but as the proclamation and Governor Murray's Commission have never been published in French, and the two Ordinances of February and March,

1764, which have been, are very concise, and do not specify the laws introduced,—the greater part of the people remain ignorant of the extent of the changes, and imagine ancient laws in many points still in force. When they come to know the change there will be great uneasiness. Hence at present there is a diversity in the practices of the English and Canadian subjects, with respect to letters of administration and the distribution of intestate's effects. Also in the practices of conveying and mortgaging British subjects according to English mode. French, by Notaries and Scriveners, according to French modes, and so the same lands are conveyed by both modes. Leases by Jesuits are made for twenty-one years, though by French law good only for nine years; and sundry other instances of diversity are assigned.

In criminal matters, all proceedings according to the English law.

The same as to proceeding in the civil business of the King's Bench.

In the common Pleas, the pleadings are drawn as the parties please—some in French and some in English.

Our arresting body for debt, on the mesne process, surprises the French.

Here follow remarks on the foregoing instruments :

1. They submit it as a doubt whether the ordinances of September and November, 1764, are sufficient to introduce such laws as were not established by the proclamation of 1763.

By the King's commission to the Governor, a certain degree of Legislative authority is communicated to him, to be exercised with advice of Council and Assembly, and no Legislative authority without the Assembly; and, therefore,

the ordinances are considered to be void. If so, they are good only as to the erection of Courts.

True, there is a private instruction, with advice of Council to make fresh rules as appear necessary for peace and order, not extending to life, limb or liberty, duties or taxes. But we doubt whether such power can be given, except under the Great Seal, read and notified ; and, therefore, we think the instruction void as to the conveying a Legislative authority.

If it is not void, the authority is too small for the introduction of English laws, particularly the criminal (which all affect life, limb or liberty,) and the arrest of the body, commitments for contempts. But these reasons do not touch the higher instrument for the introduction of English laws, viz. : the Articles of Capitulation, the Treaty, and the Proclamation of 1763."

*12th. July, 1769—Council Book B.*

"Inconveniences from the present state of the Laws and administration of Justice. Their uncertainty in the greatest : either English or French should be avowed. A remedy is necessary. There are inconveniences in Judicature ; proceedings expensive, tedious, and more severe than under the French. These evinced and explained. A plan held up. A Judicature proposed for each District of Quebec, Montreal, and Three Rivers. One Judge in each : a Barrister of five years standing, and a French assistant ; the latter to have no deciding power. A Court to be held once a week. The method of proceeding to be this :

1. A plaint in French or English. A summons, if good cause found. If defendant does not appear, a compensation to plaintiff for his trouble. Another summons. On default, judgment. If he appears, plea in writing. Then the judge to interrogate parties on disputed facts, and answers to be reduced to writing. Then he is to state the facts in diffe-

rence, and ask whether they will have a Jury : if they do, a Jury to be summoned next Court. He that desires a Jury, to pay their expenses, 5s. sterling each. They are to be appointed as Special Juries in England, by striking out twelve each. No challenges to be allowed. A majority to carry a verdict. The verdict is to be a special one. All examinations *viva voce*. Executions to run against goods and lands. An inventory of Defendant's estate may be required upon his oath, if there is not enough found to satisfy the judgment. Penalty of perjury, if twenty pounds, omitted. Costs according to Judge's discretion.

A Sheriff to be for each District. A King's Attorney in each. Appeals to Governor and Council and thence to the King.

The three Chief Judges and Attorney General to be of the Council, that the board may not want law knowledge.

These appeals should be only in the nature of writs of error, except in the instance of a Judge's proceeding without a Jury, when the evidence should be reduced to writing, as in a General Court Martial.

New Trials at law to be by a double Jury, and to be final. These the outlines of the plan.

It remains to consider the first and greatest inconveniences arising from the uncertainty of the law. Four methods occur :—

I. A code of laws for this province, that shall contain all the laws by which it is to be governed for the time to come, to the entire exclusion or abolition of every part of the Laws of England and French Laws that shall not be set down in the Code itself.

II. To revive all the French Laws to the exclusion of the English Laws, except the statutes above mentioned, and a few eminently favorable to the liberty of the subject,



and to introduce those by a particular ordinance or proclamation published in the Province, as to take away torture, the punishment of the rack, introduce the *habeas corpus*.

III. A third method :—Making law of England the general law, with an exception of particular subjects, to permit former customs, at the time of the conquest, or

IV. The law of England to be the general law, with an exception in favour of the former customs, and with respect to these, to enumerate them, and abolish all not enumerated in the proclamation.

As to the first, it would be troublesome. Canadians would think it rash and dangerous. A speech is put into their mouths and the compilers supposed to be incapable to answer it, from the immense difficulty of the undertaking. Some of the old to be rejected, other parts retained. There will be omissions, imperfections and obscurities. An intimate and long experience necessary to make the choice. There is a strong connection between the parts, and dangerous to break it. If the old is left, no code is wanting. The greatest lawyer in Paris not equal to the work. An Englishman would not know where to look for it. On the other hand, the advantages will be these:—The Judges would have a short rule, not be misled by French lawyers in citing and misapplying, &c. The English subjects would know the law easily. It would deface the idea of French law, and the attachment to a French government. Imperfections might be removed as experience brought them to light. It would be sufficiently exact at the beginning for all common cases. As to the second method, the inconveniences would be these:—

1. Keep up a respect for the French laws and government.

2. Disgust the English who think they have right to the English laws.

1. Imagining the conquest rendered the French laws void, though in this the law is otherwise.

2. That they were really introduced by the proclamation of 1763. The second method has these inconveniences.

1. Maintain a reverence for the laws of Paris, though less than the other methods.

2. The Canadians will make the following objections :—

1. That the whole of the French law should have been maintained to preserve the chain of connexion and avoid dangers:

2. The English laws ought to be particularly enumerated, and published in French at full length. But a few Canadians will make these objections.

As to the fourth method, it would wear out the very remembrances of the French Laws, Edicts, Government, &c., and have many advantages beyond the other method. But it would be troublesome to the ministers to form the Code.

It would be liable to many imperfections, from the inaccurate manner of setting forth the French laws and customs, and to the two last objections made to the third method, viz : a part of their French law would give but an imperfect satisfaction, and they would complain of the not setting forth the English law introduced at large,

Conclusion. That they cannot draw a balance in favor of any one of these methods in preference of the other, nor find a new one preferable to them all, being unequal to the task. We have no other merit than that of giving some information of facts. Your Majesty is best able to decide."

Again, the author remarks :—Vol. 2, p. 184 and seq :

“ With a view to report a statement of the comparative advantages and disadvantages of the tenure in free and common soccage and the tenures of the Province, of a different description, the Governor (in the year 1788) appointed a committee of Council for that purpose. The committee was empowered to call upon the Attorney General and Solicitor General for their opinions on the subject matter of the reference, and to take all such other means as they might think expedient for acquiring the necessary information. The advantages of the soccage tenure are apparent in every country where that system has been introduced, and the disadvantages of the other have manifested themselves wherever the latter has taken place. A Canadian Seignior is ordinarily of, &c. The Council stated in their resolves, &c., that the population of the province depending now upon the introduction of British subjects, who are known to be all averse to any but English tenures, and the Canadian Seigniors of course be left without a hope of multiplying their *censitaires*, except from the predilection of the descendants of the French planters to usages no longer prompted by the motives of interest nor recommended by example, *That the grant of the waste lands of the Crown in free and common soccage is essential to the growth, strength, defence and safety of the farmer* \* \* \* \* *That the prerogative is competent to put the waste lands of the Crown under a soccage tenure. But the legislative intervention is necessary to make that tenure universal.* That if this is to be the work not of Parliament, but of the Colony Legislature, the Royal instructions given for the greater security of the property of the subject, will require an act, with a probationary or suspending clause, until His Majesty’s approbation can be obtained. That an absolute and universal commutation of the ancient tenures, *though for a better*, would be a measure of doubtful policy ; but that no substantial objection occurs against giving such individuals that benefit as desire it, and especially to such of the Seigniors whose tenants or *censitaires* shall conceive it to be for their

own as well as for the interest and benefit of their landlords, and may therefore signify their consent to the change.—*Smith's History*, vol. ii., pp. 184—212.”

As to the King's power to legislate at all by proclamation, it was once a mooted point,—but the principle that the King had such power was adopted in the case of *Campbell vs. Hall*, (1 Cowper, 209), by Lord Mansfield, and it has ever since been recognized.

But apart from decisions, we have legislative enactments. A third ordinance was passed at the same time as those already mentioned in 1764, requiring the registration of deeds of conveyance or mortgage, and contrary to the law of France, proof of the execution of the instrument was required, (though notarial) by the oath of the parties to the instrument.

In process of time there were increased doubts as to free and common soccage lands.

As to the Eastern Townships, they were remote, suits were few, and with reference to marriage contracts, probably not more than 120 or 150 have ever been executed.

At last the Legislature of Great Britain interfered in an extraordinary manner, and all doubts were removed by it. The Canada Tenures Act, 6th Geo. IV., cap. 59, by its 8th sec. declares, “whereas doubts have arisen whether lands granted in the said Province of Lower Canada, by His Majesty, or by any of His Royal predecessors, to be holden in free and common soccage, shall be held by the owner thereof, or will subsequently pass to other persons according to the rules of alienation and descent in force in England, or according to such rules as were established by the ancient laws of the said province, for the descent and alienation of lands therein;” it is therefore enacted “that all lands within the Province of Lower Canada, which have heretofore been granted by His Majesty, &c., to be holden

in free and common soccage, or which shall or may hereafter be so granted, &c., may and shall be, &c., held, granted bargained, sold, alienated, conveyed and disposed of, and may and shall pass by descent, in such manner and form, &c., as are by the law of England established and in force in reference to the grant, &c., or to the dower or other rights of married woman." And the Act goes on to reserve to the Colonial Legislation the power of modifications "for the better adapting the before mentioned rules of the law of England to the local circumstances and condition of the said Province of Lower Canada, and the inhabitants thereof."

After this came the Act of the Lower Canada Legislature, commonly called "Bowen's Act," the 9th Geo. IV., cap. 77. It is true that doubts have been expressed as to whether it was in force from its not having been proclaimed within two years after the passing thereof, in conformity with the requirements of the 31st. Geo. III., cap. 31, sec. 33; but it is on our statute book as in force; I am of opinion that it is in force, and it is certain that the Legislature of Lower Canada have declared the existence of the Imperial Act, and of the Act of 1794, by the 10th and 11th Geo. IV. Bowen's Act was necessary in consequence of the extremely loose way of dealing with land which had grown up. We find in it the words "right of *dower*," which could not be said to refer to *douaire coutumier*; but I understand that it referred to the english barring of dower, which could only be done by certain forms.

There is still another recognition by our Legislature of the English law, in the Registry ordinance of the special council, 4 Vic. cap. 30, of which the 34th sec. has the following words:—"Whereas, the alienation of the real estates of "married women held in free and common soccage, and "those held under other and different tenures in this Province, is governed by different rules, and whereas it is "expedient that such alienations of real estates should be "governed by the same rules." Here we have a recognition

of the difference of the tenure, and that the *douaire coutumier* cannot exist with the soccage tenure. It is said that this tenure is the same as the *franc alleu*,—but this is a great fallacy. There is an essential difference between the two; for land in *franc alleu* descends to the children in equal shares, and soccage land rightly or wrongly recognize primogeniture, as the rule of descent. Again under the custom of Paris, the tenure *en fief* has one rule of descent and that *en roture* another.

The last observation that I would make is that the soccage tenure having its incidents or “nature and consequences,” which are characteristic and distinctive, the King who granted these lands by this tenure had a right to make his grants subject to such customs as he pleased; the acceptance of them was voluntary. Parties may in their marriage contracts derogate from the Custom of Paris. Why should not the King do the same in his grants. The grantor may make such conditions as he pleases. He imprints his will on the grant, and that cannot be altered. At common-law a grant of lands in free and common soccage carries certain conditions with it, and just as lands *en fief*, are descendible by one rule, and those *en roture* by another, the free and common soccage tenure carries with it its own rule of descent, alienation and dower. Having expressed my opinion at length in the case of Stuart and Bowman which is reported, it would be waste of time upon the present occasion to say more than to refer to it. I would merely observe, that at this argument reference was made to a case of *Delanaudière and Baby*. I have a particular knowledge of that case. The suit was one of an amicable kind, between a mother and her children. It was not a case of *douaire* at all, but a very different one, the partition of the *biens de la communauté* between the widow and her children. There was a contract of marriage, by which *communauté de tous biens présents et à venir* was stipulated.—Subsequently to this marriage a grant of Crown lands in free and com-

mon soccage was made to the husband ; of course either the lands or their equivalent fell into the *communauté*. I am persuaded that the judgment of Chief Justice Sewell (1) intended to go that length but no farther. I am constrained then to adhere to my former opinion, and I would dismiss the appeal, but am in the minority.

The *motifs* of the Judgment in Appeal were as follows :—

“ The Court, &c., Considering that the late Joseph Wilcox, father of the Respondent, by his first marriage, died on the 31st January, 1825, contracted a second marriage with the appellant, Sophia Blodget, and that at the time of the celebration of this second marriage the said Joseph Wilcox held and possessed, as proprietor, the immoveable property claimed by the respondent by his present action ;—considering that at the time of the marriage of the said Sophia Blodget with the said Joseph Wilcox, lands held in free and common soccage in Lower Canada were subject to dower, in favour of married women and of their children, in the manner prescribed by the custom of Paris ; that no contract of marriage having been executed by and between the said Sophia Blodget and the said Joseph Wilcox, anterior to the celebration of their said marriage, the lot of land described in the plaintiff’s declaration became subject to dower in favor of the said Sophia Blodget and of the children born of her marriage with the said Joseph Wilcox, as prescribed by the custom of Paris, by which the children of the said late Joseph Wilcox, born of his marriage with the said Sophia Blodget, may claim a right of property in the one un-

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(1) Chief Justice Sewell, as Attorney General, took a very active part in the grants of lands made by the Crown in the townships, all of which are in the English form of Letters Patent. One or two of these grants were made to the patentees “ as tenants in common,” under the English rule regulating such tenancy. To remedy the evil arising from grants in such form, a Statute of Canada, the 10 and 11 Victoria Cap. 37 was passed, and in the very last session of Parliament, our Canadian Legislature made provisions further to facilitate a partition by passing the Statute of the 20 Victoria, Cap. 139. The term “ tenant in common,” and the phraseology of the Patents universally, shew that the framer had in contemplation English and not French law.

divided moiety of the said lot, subject to the usufruct now claimed by the said Sophia Blodget;—considering, therefore, that on the day of the decease of the said Joseph Wilcox, that is, on the 28th day of April, 1846, the said Sophia Blodget and the children of her marriage aforesaid, were by law entitled to claim the said dower, and that by reason thereof, the right of usufruct in the one undivided moiety of the said lot of land was vested in the said Sophia Blodget, of which one undivided moiety she is now in possession, having retained possession of the whole lot from the time of the decease of the said Joseph Wilcox;—considering that for the reasons above stated, the Respondent's claim to the whole of the said lot of land, in virtue of his purchase thereof, from his late father on the second day of February, 1826, is not founded in law, but that the said claim must for the present be limited to the one undivided moiety of the said lot, and the conclusions of his declaration restricted to the said one undivided moiety; considering that the further claims set up by the appellants, by their plea of peremptory exception are not founded in law;—considering lastly that in the final Judgment pronounced by the Court below, there is error, inasmuch as the said Judgment does not admit the said claim of dower, the Court, now here, doth reverse, annul and set aside the Judgment so pronounced by the Court below, on the 30th of January, 1856, and doth condemn the respondents to pay to the appellants the costs of the present appeal. And this Court proceeding to render the Judgment which the Court below ought to have rendered, doth declare and adjudge that the claim of the said Sophia Blodget to the usufructuary possession of the one undivided moiety of the said lot of land is well founded in law and appertains to her *à titre de douaire coutumier*, and the right of property therein to such of her children aforesaid as may hereafter claim the same, and that the claim of the said respondent to the right of property in the aforesaid one undivided moiety of the said lot, is, for the present, unfounded in law, but that the claim of the respondent to the other



undivided moiety of the said lot is well founded in law; in consequence doth condemn the appellants, within thirty days from the day of the service of the present judgment, to deliver up to the respondent possession of the one undivided moiety of the aforesaid lots of land described in the judgment pronounced by the Court below, on the 30th day of January, 1855, together with the issues and profits of the moiety of the said lot or the value thereof to be computed from the 13th day of April, 1853, and the costs incurred in the said Court below.

And this Court doth reserve to the respondent such recourse as he may lawfully have for the recovery of the right of property and possession of the undivided moiety of the said lot, now in the possession of the appellant, Sophia Blodget, after the expiration of her right of usufruct aforesaid.

And it is ordered that the record be remitted to the Court below, sitting at Sherbrooke. The honorable Mr. Justice Aylwin dissenting.

FELTON, W. L., for appellants.

DUNKIN, CHRISTOPHER, Counsel.

SANBORN & BROOKS, for respondent.

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## VICE-ADMIRALTY COURT:—LOWER CANADA.

Before the Hon. H. BLACK, Judge, Vice-Admiralty Court.

### THE PILOT.—*Collins.*

Held:—That under the provisions of the merchant shipping act of 1854, a seaman who has contracted and signed articles for a voyage to British North America, and back to a final port of discharge in the United Kingdom, is not entitled to recover for wages here on the ground of apprehension of danger to life, in consequence of the unseaworthiness of the vessel.

Jugé:—Que sous les dispositions de l'acte de la marine marchande de 1854, un matelot qui s'est engagé et a signé un contrat par écrit pour un voyage à l'Amérique Britannique du Nord, et de retour à un port de décharge dans le Royaume-Uni, n'est pas en droit de recouvrer ses gages sous le prétexte que sa vie est en danger par la raison du mauvais état du vaisseau.

Judgment rendered the 16th October, 1851.

The promoter caused the "Pilot" to be arrested on a claim for wages as seaman. The case was originally instituted before the Inspector of Police who referred it under the terms of the statute to the Vice-Admiralty Court.

An appearance under protest was filed on behalf of the owners, and by their protest it was alleged that no sum of money for wages, nor any action therefor, could be claimed or instituted in this Court because the promoter had entered into an agreement or engagement with the master of the vessel whereby he had agreed to serve on board thereof in the capacity of seaman on a voyage from Sunderland to Carthagena, thence to Quebec, and thence back to a port of delivery in the United Kingdom, in consideration of which service to be duly performed, the said William Collins, the master of the said ship or vessel, did, in and by the said agreement or engagement, agree to pay to the said promoter, as wages, the sum of three pounds, to wit, sterling money, per month, and to supply him with provisions according to the scale annexed to the said agreement or engagement; and the said promoter did further agree and contract that he should not and would not be entitled to his discharge from the said ship or vessel during any voyage in which she might be engaged, nor until her arrival in a port in the United Kingdom aforesaid; in witness whereof,

the said master, to wit, the said William Collins, did, at Sunderland aforesaid, on the said first day of March last past, subscribe his name to the said agreement or engagement in the presence of the shipping master of Sunderland aforesaid, who also, then and there subscribed his name to the said agreement or engagement opposite the signature of the said master ; and the said promoter did at the time and place also last aforesaid subscribe his name to the said agreement or engagement by affixing and making, and the said promoter did then and there affix and make his mark of a cross thereto, in the presence of the shipping master aforesaid, who, also then and there subscribed his name to the said agreement or engagement opposite the signature of the said promoter, by writing his initials thereto ; and the said promoter further expressly alleged that the said agreement or engagement was so signed by the said master before the said promoter affixed his said signature thereto ; and that the same was read over and explained to the said promoter, before he, the said promoter, so affixed his mark thereto ; and that the said signatures of the said master and the said promoter were severally attested by the shipping master aforesaid at the time and place aforesaid : —And the said proctor further expressly alleged that under and in pursuance of the said agreement or engagement, the promoter in this cause served on board the said ship or vessel as such seaman from Sunderland aforesaid to Carthagea aforesaid, and thence to Quebec aforesaid, and that the said ship or vessel is about returning to her final port of delivery in the said United Kingdom, to wit ; to Sunderland aforesaid ; and that inasmuch as the said promoter was engaged and did engage and agree to serve on board the said ship or vessel, as such seaman for a voyage or engagement which was and is to terminate in the United Kingdom aforesaid, and inasmuch as the said ship or vessel hath not yet returned to a port of delivery or discharge in the said United Kingdom since leaving the port of Sunderland aforesaid ; and that the said promoter hath not been dis-

charged from the said ship ; and hath not suffered ill usage on the part of the said master or by his authority ; and that neither the said agreement or engagement so entered into by the said promoter as aforesaid, nor the voyage therein described is yet terminated, and that in consequence thereof he, the said promoter, is not entitled and cannot sue for wages in any Court out of the said United Kingdom ; and accordingly that the claim or action of the said promoter for his wages is not within the jurisdiction of, nor cognizable by this Honorable Court ; and in verification of what he so alleged ; the said Thomas Pope prayed leave to refer to the affidavit and to the said agreement or engagement above mentioned by him to be brought into and left in the registry of this Court.

Wherefore, he prayed the Worshipful the Judge to admit the validity of his protest to dismiss his parties from all further observance of justice in this cause, and to condemn the said William Wallace, the party promoting the same, to costs.

To which the promoter replied as follows :

In presence of Pope, proctor of John Thomas Alcock, John Fleming and Daniel Fleming, the owners of the said vessel ; Hamby F. Cairns, the proctor of William Wallace, the party promoting this suit, dissenting, and denying the allegations of John Thomas Alcock, John Fleming and Daniel Fleming, to be true ; and he alleged that the said vessel, called the *Pilot*, was condemned as unseaworthy in England, before the said John Thomas Alcock, John Fleming and Daniel Fleming, became the owners of the same ; that the said John Thomas Alcock, John Fleming and Daniel Fleming, purchased the said vessel, called the *Pilot*, for a sum of six hundred pounds, which is far below the value of a staunch, good, seaworthy ship of the size and capacity of the *Pilot* ; that the said owners did not repair the said vessel, or make her seaworthy before the

said vessel left Sunderland, and on the said intended voyage to Carthagena and thence to Quebec, and have not yet repaired the said vessel or made her seaworthy ; that the said vessel, while on her said voyage, did spring a leak and was in danger of foundering at sea, and with great difficulty was brought to Carthagena in a sinking state ; that while in Carthagena, the said vessel was not sufficiently repaired to make her seaworthy and staunch, and again began to make water on her voyage to Quebec (although in ballast), in the first storm which she did encounter ; that since the arrival of the said vessel in Quebec, the said vessel hath not been repaired sufficiently to make her staunch, seaworthy, and fit to navigate with safety to the life of the crew ; that the said vessel is rotten in her timbers, and masts, and rigging, and is not now seaworthy nor safe to navigate, and is also so old and crazy, that the bolts which hold the said vessel together are in danger of working out by the motion of the said vessel, and thus causing the oakum to work out of the seams of the said vessel, making her leaky ; and the said vessel is in danger of falling and breaking to pieces at sea in stormy weather, if such weather is encountered by the said vessel on the intended voyage from Quebec to the United Kingdom of Great Britain and Ireland, the life of the said William Wallace and the lives of the crew of the said vessel are in danger in navigating the said vessel from this port of Quebec, on the said intended voyage to the said United Kingdom, the more especially at this season of the year, when the navigation of the said River St. Lawrence, and of the Gulf of St. Lawrence, and of the Ocean is most dangerous ; that by reason of the rotten and dangerous condition of the said vessel, the said William Wallace cannot be compelled to proceed to sea, and thus risk his life in her ; and for all the purposes of justice and of the rights of the said William Wallace, the said voyage hath determined and come to an end, and the said William Wallace is entitled to bring an action for, and recover the

said balance of wages in this Court ; and this Honorable Court hath jurisdiction in the premises. And in verification of what he so alleged, the said Hamby F. Cairns prayed leave to refer to certain affidavits to be by him exhibited and left in the Registry of this Court. Wherefore, he humbly submitted that this cause of wages is cognizable by this Honorable Court, and prayed the Worshipful the Judge to overrule the said protest, to assign the said John Thomas Alcock, John Fleming, and Daniel Fleming, to appear absolutely, and to condemn the said Thomas Pope and his said parties the said John Thomas Alcock, John Fleming and Daniel Fleming in costs.

Judgment maintaining protest.

CAIRNS, for promoter.

POPE, THOS., for respondents.

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**BEFORE THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL.**

**Present :—**LORD JUSTICE KNIGHT BRUCE, THE CHANCELLOR  
OF THE DUCHY OF CORNWALL, LORD CHIEF BARON OF  
THE EXCHEQUER AND LORD JUSTICE TURNER.

**BEAUDRY,.....** *Appellant.*

and

**THE MAYOR, ALDERMEN AND CITIZENS OF  
MONTREAL,.....** *Respondent.*

**Held :—**1o. That on proceedings by the Corporation of Montreal for the taking of land for public use under the Provincial Statute of 14 and 15 Vic. c. 128, secs. 66, 68 and 69. The justices of the peace could not refuse to swear, nor the jury to hear, the witnesses produced before them.

2o. That such refusal invalidated the verdict or assessment by the said Jury.

3o. That the *appearance and attendance* of the proprietor at the proceedings, had subsequently to such refusal, cannot be taken as a waiver of his right to complain of the illegal decision, there being no act of express acquiescence thereto.

4o. That, in the case submitted, recourse could be had to a direct action, against the taking of the ground in question, by reason of the verdict being illegal and null. (1)

**Jugé :—**1o. Que sur procédures par la corporation de Montréal à l'effet de prendre possession d'un terrain pour des objets d'utilité publique en vertu de l'acte de la 14<sup>me</sup> et 15<sup>me</sup> Vic. ch. 128, secs. 66, 68 et 69. Les juges de paix ne pouvaient refuser d'assermenter, et les jurés d'entendre, les témoins produits devant eux.

2o. Que tel refus a rendu nul le rapport ou l'estimation des dits jurés.

3o. Que la comparution et présence du propriétaire lors des procédures subséquentes à tel refus, ne peuvent être prises comme désistement du droit de se plaindre de la décision illégale, d'autant plus qu'il n'y a aucun acte exprès d'acquiescement à icelle.

4o. Que, dans l'espèce, l'on pouvait recourir à l'action directe contre la prise de possession du terrain en question, attendu la nullité et l'illégalité du rapport des jurés.

Judgment delivered the 17th. February, 1858.

This was an action of trespass to the land of the plaintiff. The defence was, that the Mayor, &c., of Montreal had acquired a right to it under the provisions of an Act passed by the Local Legislature 14 & 15 Vict., cap. 128, secs. 66, 68, 69.

The plaintiff bought the property at a public auction for between £100 and £200. On the very day the conveyance was executed, he was served with a notice that the Corporation would take steps to acquire the part of the property they wanted for some public improvement; and at the end of a month, they petitioned the Justices, under the 68th section of the Act, to summon a jury.

(1) 6 L. C. Rep. 328.

The plaintiff protested then, and objects now, that the Mayor, &c., ought to have endeavoured to make a voluntary agreement before he presented a petition to the Justices

The plaintiff also objected that Pelletier, their attorney, who gave the notice to the appellant on behalf of the Corporation, had no sufficient authority to give the notice; that he was only their agent for suits; that a special authority was necessary for this purpose; and that the notice ought to have been under seal.

The Justices, under the 69th section, assembled a jury; the plaintiff attended under protest; counsel were heard; some evidence was given of the deeds of conveyance to the plaintiff below, but whether by consent, or how, does not appear; when, however, he proposed to call witnesses to prove the amount of his claim, the Justices said they had no power to administer an oath, which we think must be understood to be a refusal to hear them, as they could not be sworn, and the jury said they did not require, and would not hear, witnesses.

The jury returned a verdict for £650. The Mayor, &c., allowed the matter to rest for five months, and then tendered the money; paid it under the provisions of the Act, and took possession, which is the trespass complained of.

The plaintiff then obtained a certiorari to bring up the proceedings of the Justices.

The Superior Court held that what took place before the Justices was not a "judicial proceeding," that a certiorari did not lie, and they quashed the writ.

The plaintiff thereupon commenced the present action in the Superior Court; in the proceedings in that action, evidence was given of what the Justices had decided, and what the jury had said and done. The Court (there being four members) was divided; three decided against the



plaintiff altogether (though part of his complaint was for taking a small portion of the property not included in the notice), one member of the Court was in favour of the plaintiff. We have no statement before us of the grounds of the decision of the majority of the Court, or of the reasons of the dissenting Judge for not concurring with the rest of the Court.

The plaintiff appealed to the Court of Appeal.

In his statement of facts he mentions the points of the refusal to swear the witnesses by the Court, and the refusal to hear them by the jury ; but he does not specially mention this in the grounds or reasons of the appeal, but he alleges the general ground that the proceedings were illegal.

The members of the Court of Appeal differed ; they all concurred in rectifying the error of the Court below, as to the small portion taken which was not included in the notice ; but three gave judgment against the plaintiff, and the remaining Judge assigned his reasons for dissenting, and these judgments are before us. On this the plaintiff appealed to Her Majesty in Council. We think it is not necessary to decide, and we express no opinion on any of the objections which have been argued before us, except that which relates to the proceeding before the Justices under the local statute in question.

The Act had recently passed, and probably this was the first time it was resorted to by the Corporation to acquire property in land.

The first question is, whether the meaning of the Act was that the jury should be assembled by the justices, and sworn, and then should decide, with or without evidence, at their pleasure, acting as experts and arbitrators, and not as a jury. Now, by the 70th section, the same mode of proceeding is made applicable to various cases of damage to real property requiring compensation ; and, among others, to

the removal of any establishment by virtue of any bye-law. It seems impossible that the privilege of having witnesses sworn and examined could be intended to be taken away in all cases under the 70th section; and, if not under the 70th, then not under the 68th; and, indeed, in any case where a jury is summoned and sworn, to determine and award the amount of compensation it would, in our judgment, require express words, or an implication of absolute necessity to take away the claimant's right to have his witnesses sworn and examined. We think the statute did not take this right away. If the Justices were competent to swear the jury, so were they to swear the witnesses; and, in our judgment, the witnesses might have been, and ought to have been, sworn and examined. There are then only two remaining questions:—Has this been waived? and can we take notice of it?

It seems to us that when the Justices decided that they had no power to administer an oath, and therefore (as we consider) declined to swear the witnesses and receive their testimony, the claimant could do nothing more than he did; it was not his business to protest in Court, but respectfully to submit to a legal decision. In order to prove that he acquiesced and waived his right to complain of an illegal decision, it ought to be shown that he said or did something to give the Court a jurisdiction which the statute did not give them. Mere respectful acquiescence, or submission to the ruling of the Justices, will not, we think, amount to a waiver.

Then, lastly, can we notice the objection?

It is certainly before us as a fact; and as the local Act does not direct any judgment to be given, or make the proceedings conclusive and final, we think any manifest failure of observing the fundamental forms and principles of the administration of Justice would vitiate the proceeding before the justices, and render it null and void; and we shall ad-

vice Her Majesty to reverse the judgment, and, in as far as the same has been appealed against, give judgment for the plaintiff, remitting the case back to the Court below to assess the damages, each party paying his own costs in this appeal.

**SUPERIOR COURT.—QUEBEC.**

**Before MEREDITH, Justice.**

No. 102. { WARREN.....*Plaintiff.*  
                  { vs.  
                  { HENDERSON *et al.*.....*Defendants.*

**Held :—**That a carrier who undertakes to convey goods from Quebec to Chicago, with power to tranship at Kingston, complies with the usage of this port, by transshipping from a steamer into a sailing-craft, and is therefore not responsible for the loss of such goods occasioned by tempestuous weather in which such sailing-craft was wrecked.

**Jugé :—**Qu'un commissionnaire qui entreprend de transporter des marchandises de Québec à Chicago, avec le droit d'en faire le transbordement à Kingston, se conforme à l'usage de ce port en transbordant les effets d'un vapeur sur un vaisseau à voile, et par conséquent n'est pas responsable de la perte de telles marchandises occasionnées par le mauvais temps et le naufrage de tel vaisseau à voile.

**Judgment rendered the 9th January, 1858.**

This was an action brought to recover the value of 50 barrels of herrings and 1 hogshead of codfish, shipped by the plaintiff, at Quebec, on board of a steamer of the defendants, for conveyance to Chicago. By bill of lading, it was agreed that transshipment should take place at Kingston. The declaration alleged, that in consequence of the negligence, carelessness and inattention of the defendants, the goods in question were never delivered, but on the contrary were lost and destroyed, to the damage of the plaintiff of the value thereof—the sum of £50.

The defendants alleged that the goods in question were duly transhipped by them at Kingston, on board of a sailing vessel, called the "Hesione," and that after leaving Kingston, and while on her course for Chicago, she encountered tempestuous weather, in lake Erie, by the force and vio-

lence of which she was driven on shore and wrecked, and that thus, without any fault, negligence or want of care on their part, and by a power over which they had no control, they were prevented and rendered unable to deliver the goods in question, and that their liability for accidents of this nature was specially excepted by the bill of lading in question.

The whole question of negligence and want of care, imputed to the Defendants, turned upon the point, as to whether they were justified in transshipping from a steamer into a sailing-craft, instead of into another steamer,—the plaintiff pretending that a steamer would more easily have escaped the effects of the tempestuous weather.

**MEREDITH, Justice :—**The defendants are sued for the value of fifty barrels of herrings and one hogshead of codfish, which the plaintiff, on the 11th September, 1855, shipped on board the steamer "Huron," belonging to the defendants at Quebec, and thence bound to Chicago. By the bill of lading, the defendants undertook to deliver the fish in question at Chicago, they having however (under the bill of lading), the privilege of transshipping the fish at Kingston.

The defendants, by their plea, admit in effect that the fish, already mentioned, was shipped on board the steamer the "Huron" at Quebec, and that at Kingston, it was transhipped into a vessel called the "Hesione," (being a sailing vessel), and they allege that that vessel, in the course of her voyage, met with tempestuous weather in lake Erie, where, by the force of the winds and waves, she was driven a shore and wrecked ; and that thus, without any fault on the part of the defendants, and by reason of a cause, for which they are not responsible, it had become impossible for them to deliver the herrings and codfish in question at Chicago.

The plaintiff contends that although under the bill of lading, the defendants had the power of transshipping at Kingston, yet, as the goods were shipped on board a steamer at Quebec, that they ought to have been transhipped into a vessel of the same kind ; and that the defendants had no right to tranship them into a sailing vessel. The case turns on this point, and was so considered at the argument.

The defendants have proved by three witness conversant with the usages of the forwarding business at Kingston, that it is usual to tranship, at Kingston, goods intended for Chicago and other western ports ; and that sailing vessels are generally used for the conveyance of goods to the ports in the upper lakes. Mr. Thomas F. Kelly who has been engaged in the forwarding business for six years, and who during three years of that period, was stationed at Kingston, says : “ It is usual to tranship goods at Kingston which are “ destined for Chicago and other Western ports, unless a “ special agreement is made to the contrary. The craft “ invariably employed for the forwarding of goods from “ Kingston to the Western ports are sailing craft, viz : “ schooners unaided by steam power, and between King- “ ston and Quebec steamers or barges in tow. ” Mr. Donald C. Thompson who says that he has been engaged for a number of years past in forwarding goods between Quebec and the ports in the upper lakes, says, “ that the craft in- “ variably used for the forwarding of goods from Kingston “ westward are sailing craft. ”

Mr. Falconer, a gentleman in the employ of the defendants at Kingston, and who has been engaged in the forwarding business there since 1853, says, “ sailing craft or schooners “ are generally used for the conveyance of goods from “ Kingston to Chicago. It is an exception to find a stea- “ mer used for the forwarding of goods from Kingston to “ Chicago or the western ports.” On this point the plaintiff has examined two witnesses, Mr. Edwin Armstrong and Mr. William T. Holland. Mr. Armstrong who is a commis-

sion merchant resident at Chicago says.—“ The custom is to tranship at Kingston by the same mode of conveyance originally used.” The witness however says he never resided at Kingston ; that he is unable to specify any instances in which the custom of which he speaks was observed, and, in fact, that his opinion as to the custom relating to the transshipment of goods at Kingston is based upon what he knows to be the usage elsewhere, now it seems to me that the witness has erred in drawing this inference. The river navigation may be said to terminate, and the lake navigation to commence, at Kingston. It is this that renders a change of craft there advantageous ; and the transshipment generally takes place in consequence of the change of craft. In this respect the situation of Kingston differs from that of the river ports below it, and of the lake ports above it ; and Mr. Armstrong has therefore I think erred in assuming that the usage as to transshipment must be the same at Kingston as elsewhere.

Mr. William T. Holland, the other witness examined on this point by the plaintiff, has been in the forwarding business between Quebec and the ports in the western lakes for the last four years, two of which he spent in Kingston ; and he says “ we should consider that under that kind of bill of lading we should be bound to tranship into a similar description of vessel, that is, into a steamer.” But he repeatedly observes in the course of his deposition that he cannot say what the general custom in Kingston is, or was, with respect to the forwarding of goods to ports west of Kingston. This witness expressly limits his evidence as to usage, to the mode in which his employers carried on their business ; and he says in another part of his deposition, “ but we never shipped without expressing on the bill that we should have liberty to tranship into barges or sailing craft,” this evidence is of importance, for at the same time that it shows Messrs. Walker and Berry were in the habit of inserting in the bills of lading signed by them a

clause calculated to obviate difficulty, it also tends to prove that they did generally tranship from steamers to sailing vessels, thus strengthening the proof of the usage contended for by the defendants.

I have deemed it right to advert to the evidence as I have done, because a careless examination of it might leave the impression that it is very conflicting as to the point under consideration ; whereas the fact is that the evidence on the part of the defendants fully establishes the usage for which they contend ; and that this evidence is not weakened to any considerable extent by the evidence on the opposite side. According to this view, and it is the one I adopt after examination of the record, the case presents but little difficulty. The defendants had a right under the bill of lading to tranship the property entrusted to their care ; they therefore had a right to tranship that property in the mode usual at that time ; and as it is proved that they did so, I hold that they are not chargeable with negligence, and that the non delivery of the goods belonging to the plaintiff during the navigation of the year 1855 was not attributable to any fault on their part. The present action is in consequence dismissed with costs.

HOLT & IRVINE for plaintiff.

STUART & VANNOVUS for defendants.

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## IN THE CIRCUIT COURT.—STANSTEAD CIRCUIT.

Before :—SHORT, Justice.

No. 195. { STUART..... Plaintiff.  
vs.  
{ EATON ..... Defendant.

Held:—1o. That a squatter who has made substantial improvements (*impenses utiles*) upon real property occupied by him, without the consent of the proprietor, is entitled to judgment against the proprietor for the excess of the value of such improvements beyond the rents, issues and profits, and to retain possession of the real property till paid for his improvements.

2o. That the only legal mode of ascertaining the value of improvements and *fruits et revenus*, when the value of such ameliorations are claimed by the defendant in answer to a petitory action by the proprietor, is by an *expertise*.

3o. That the eldest son, as heir to his father, deceased intestate, is seized as proprietor of lands held in free and common socage, by virtue of the right of primogeniture as one of the incidents of that tenure, and can maintain a petitory action for the recovery of such lands (1).

Jugé:—Qu'un *squatter* qui a fait des améliorations, impenses utiles, sur une propriété qu'il occupait sans le consentement du propriétaire, est en droit d'obtenir jugement contre tel propriétaire, pour le surplus de la valeur de telles améliorations, au-delà de la valeur des fruits et revenus de la propriété, et de retenir la possession de telle propriété jusqu'à ce qu'il ait été payé de ses améliorations.

2o. Que le seul moyen légal de constater la valeur des améliorations et des fruits et revenus, quand telles améliorations sont réclamées par un défendeur en réponse à une action pétitoire de la part du propriétaire, est par une *expertise*.

3o. Que le fils aîné, comme héritier de son père, décédé *ab intestat*, devient propriétaire à titre d'hérédité de terres tenues en franc et commun socage, et ce, en vertu du droit d'aînesse, lequel est un des incidents de cette tenure, et peut maintenir une action pétitoire pour le recouvrement de telles terres.

Judgment rendered the 3rd. of November, 1857.

The plaintiff, the late Sir James Stuart, Baronet, instituted an action against the defendant, under the Act 14 and 15 Vic., c. 92, in the Circuit Court, at Stanstead, to recover the possession of a parcel of land, and its appurtenances, in the township of Barnston, in the said Circuit. The plaintiff derived his title from François Languedoc, who was the patentee of the land in question, the letters patent bearing date 30th June, 1827. The letters patent were set out in the declaration, as well as the deed from Languedoc to

(1) *Vide* Lawrence and Stuart, 6, L. C. Rep., 294. In this case of Lawrence and Stuart, the Court directed that the rents, issues and profits, and the compensation for betterments should, as in this case, be ascertained by an *expertise*—here the analogy between the two cases ceases. In the case of Lawrence and Stuart, the appellant was a possessor in good faith, holding under a lease from the Crown; in the present case, the defendant was a mere squatter, without title or color of title. *Ed. L. C. Rep.*



the plaintiff, and authentic copies of the titles were produced in the cause. The demand was for possession, for the rents, issues and profits, and for damages.

Subsequently to the institution of the action, and before issue was joined, the plaintiff died, and Sir Charles James Stuart, Baronet, as the eldest son of the plaintiff, who died intestate, took up the *instance*, and filed the documentary evidence proving his quality as such eldest son.

The defendant pleaded by several exceptions :

1o. That he had possessed the land peaceably and openly for thirty years and more, and had acquired title by prescription.

2o. That the plaintiff's title had never been perfected by tradition.

3o. That he had made valuable improvements in clearing and improving the land, and in the erection of buildings of the value of £250, and prayed that if the plaintiff were declared proprietor, the defendant might be authorized to retain possession of the land until he was paid for his improvements.

4o. That he had made valuable improvements in buildings, and asked, in the event of the plaintiff's being adjudged the proprietor, to be permitted to remove the buildings.

To these several exceptions was added the general issue.

The parties went to proof, and the plaintiff established his titles, and his quality as heir, as above mentioned, and further made proof by witnesses of the value of the rents, issues and profits, during the occupation of the defendant.

The defendant adduced evidence to establish that he had occupied the land in question for some fifteen years, and that he had erected buildings upon it worth £125, and had cultivated it in a husbandlike manner, and greatly im-

proved it ; the improvements were variously estimated by the witnesses, from £200 to £250. The defendant neither pleaded or proved any title to the land, or permission to occupy from the proprietor.

It was contended on the part of the plaintiff, that the law did not confer upon a possessor in bad faith the right to recover any sum for improvements upon land which he had improved without the consent or knowledge of the proprietor, and the most that could under any circumstances be conceded to him, was to compensate, by his improvements, the rents, issues and profits, and if the value of such improvements exceeded the rents, he had no claim to be reimbursed therefor. That the defendant in this case was not of the class of possessors described by Pothier (1), as "*excusable*," but of the class to whom the law accords no indulgence. " Il y a une mauvaise foi caractérisée criminelle, telle que celle d'un usurpateur, qui a profité de la longue absence d'un propriétaire, ou de la minorité d'un propriétaire qui n'avait point de défenseur, pour se mettre sans aucun titre en possession d'un héritage ; un tel possesseur de mauvaise foi, doit être traité avec toute la rigueur du droit ; il ne mérite aucune indulgence, et on ne doit point en conséquence lui faire raison des améliorations qu'il a faites à l'héritage pendant qu'il le possédait."

The defendant contended on the contrary, that it rested with the discretion of the Court, to determine each case according to its actual merits, and to consider the nature and extent of the improvements made by the possessor, and when the improvements were of a nature to render the property of far greater value, that the possessor in bad faith, as well as the possessor in good faith, should be compensated " jusqu'à concurrence de ce que la chose se trouve plus précieuse."

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(1) Droit de Propriété, No. 350.

SHORT, Justice :—This is an action *pétitoire* for the recovery of a parcel of land and its appurtenances, in Barnston. The plaintiff, the late Chief Justice Sir James Stuart, derives from one François Languedoc who was the patentee of the land in question. Before issue joined, the plaintiff died and Sir Charles James Stuart has taken up the *instance* as the eldest son of the plaintiff. His quality has been established, and the defendant has not pleaded to the *instance*, and has neither admitted or denied the pretensions of the plaintiff *par reprise d'instance* to represent his father. Upon this point, I entertain no doubt ; my opinion has been for many years settled upon this question. The free and common soccage tenure is peculiarly an English tenure, and when introduced into this Province, it was introduced with all its incidents.

The whole course of policy of the Imperial Government from the Capitulation, in 1760, downward, indicated unmistakeably the intention to introduce this tenure, with its incidents, into Canada, so far as related to lands not previously conceded and held under a different tenure.—Without entering upon the mooted point, whether the surrender of the Canadian inhabitants, without other condition respecting their civil rights, than that “ they became subjects of the King,” introduced the whole body of English law and this tenure with the rest, the subsequent legislation of the Imperial Parliament, clearly and explicitly introduces this tenure with its distinctive peculiarities as known in England. The proclamation of 1763 was treated by the Imperial Parliament as having the force of law, because it was repealed, which could not have been necessary had it been of no legal, binding force. The French civil law was *re-enacted*, not *declared*, to be in force, and, as an exception, lands granted in free and common soccage were not to be subject to the French civil law. This exception proves, if the language is not totally devoid of meaning, that, in the intention of the body legislating, English laws were prior to that time in force in Canada respecting lands granted in

free and common soccage, and that the French civil law was *not* in force, otherwise an introductory law was unnecessary, and that *thereafter* no change was contemplated in respect to the laws regulating this tenure.

The Imperial Act 6th. Geo. IV, c. 59, declares that all lands, theretofore granted, and thereafter to be granted, in free and common soccage in this Province, " shall by such grantee, their heirs and assigns, be held, granted, bargained, sold, aliened, conveyed and disposed of, and may and shall pass *by descent*, in such manner and form, and upon and under such rules and restrictions as are by the law of England established and in force in reference to the grant, bargain, sale and alienation, conveyance, disposal or descent of lands holden by the like tenure therein situate, or to the dower or other rights of married women in such lands and not otherwise." There are several other acts in which the laws regulating this tenure, are clearly recognized; but to my mind, the last above cited act needs no explanation or corroboration, it is of itself as clear and explicit as explanation can make it. Holding then that the tenure was introduced by the proclamation of 1763, confirmed by the Quebec Act, and formally declared and enacted by the Tenures Act, and as in the particular of *descent*, it has suffered no modification by our legislation, I must conclude that the plaintiff, *par reprise d'instance*, as the eldest son, is seized of the lands of his father, deceased intestate, and has a right to take up the *instance* in this cause. This point determined, the matters in issue between the parties to this cause, remain to be considered. Respecting the second objection of the defendant, want of tradition; when as in this *instance* the plaintiff traces his title to its source, the letters patent, he has the benefit of the rights of his *auteurs*. Actual physical tradition from his immediate *auteur* to him is unnecessary. None of the other objections of the defendant deserve particular remark, except the demand for compensation for improvements.

The improvements as established by the witnesses on both sides, are of a substantial character and have rendered the real property of much greater value. The Courts have been reluctant to grant to a possessor *de mauvaise foi* compensation for improvements beyond the value of the rents and profits. Pothier inclines to this opinion as a general rule. He admits however, that Cujas is of a different opinion, and further says: " Dans notre pratique, on laisse à la prudence du juge à décider, suivant les différentes circonstances, si le propriétaire doit rembourser le possesseur de mauvaise foi, des impenses utiles, jusqu'à concurrence de ce que l'héritage revendiqué en est devenu plus précieux." Although the present case is unlike the exceptions cited by Pothier, when the possessor *de mauvaise foi* may be compensated for improvements, when he is treated as "*excusable*," in my judgment, the peculiar circumstances of this country as a new country, the manner in which large tracts of land have been granted, by which great uncertainty and difficulty attend in many cases the ascertaining of titles, and the encouragement always extended by our government to actual settlers, afford sufficient reasons to render the possession "*excusable*" to the extent necessary to enable the possessor to receive compensation for the excess of his improvements beyond the rents. Besides, it is founded in justice and based upon the recognized maxim of the civil law: "*Neminem æquum est cum alterius detrimento locupletari.*"

This subject is well discussed in Guyot's Répertoire, vbo. "Amélioration," in which amongst other things is found the following: " Nous pouvons donc établir pour règle certaine que le propriétaire qui revendique un fonds, ne doit jamais s'enrichir aux dépens du possesseur de bonne ou mauvaise foi, n'importe de quelle manière cette maxime doit être mise en usage." The plaintiff, *par reprise d'instance*, must be declared proprietor and must have possession of the land, upon paying the defendant the excess of the value of the betterments beyond the rents.

The judgment rendered in the Circuit Court on the 3rd. January, 1856, is as follows :

The Court having heard the parties, etc., dismissing the several pleas of prescription pleaded by the defendant in fact and in law, adjudges and declares the late Sir James Stuart to have been prior to and at the time of the institution of the present action, and up to the time of his decease, the only lawful owner and proprietor of the land and premises described in the declaration in this cause filed, to wit : the north portion of the south half of lot number twenty-six, in the third range of lots in the said township of Barnston, bounded on the north by the north half of said lot of land now leased by the plaintiff to one Richard Baldwin, and on the south, by the southern portion or fifty acres of said lot now leased by plaintiff to Michael Lark, the said portion of said lot containing fifty acres more or less ; and that on the demise of said Sir James Stuart, the said Sir Charles James Stuart, as the eldest son and heir of the said Sir James Stuart, became, was and is the only lawful owner and proprietor of the said land and premises ; but inasmuch as it appears that the said defendant has, during his occupation of the said land and premises, expended the sum of two hundred and fifty pounds currency, in making useful and valuable improvements and ameliorations on said land and premises, which have augmented the value thereof, and that of said sum of two hundred and fifty pounds, after deducting therefrom the rents, issues and profits of the said land and premises, there remains a balance of four hundred and thirty two dollars still unpaid to said defendant : The Court condemns the defendant to restore and deliver up to the said Sir Charles James Stuart, the said land and premises within twenty days from and after the service upon him of the present judgment, on the condition that the said Sir Charles James Stuart do first pay and reimburse to him said defendant the said sum of four hundred and thirty two dollars, authorizing the said defen-

dant to retain the possession of the said land and premises until the said sum of four hundred and thirty two dollars shall be paid and reimbursed to him, etc.

This judgment was appealed from to the Superior Court, particularly that portion of the judgment awarding compensation for betterments. The Superior Court, composed of Mondelet, Charles, and Badgley, Justices, confirmed the decision respecting the right of the defendant to recover compensation for his betterments, but held that the same had been illegally proved by witnesses, and ordered the rents, issues and profits, and the improvements to be estimated by experts.

The judgment of the Superior Court, which was rendered on the 24th. January, 1857, is as follows :

The Court considering that before finally adjudging upon the pretensions of the respective parties in this cause, it is expedient that the useful and valuable improvements and ameliorations made by the defendant during his occupancy of said lot of land and premises in the declaration mentioned, as the same are mentioned and referred to in the pleadings in this cause, should have been had and ascertained,—doth order and direct that the judgment rendered in this cause by the Circuit Court, on the third day of January last, be set aside *quant à présent*, and in respect to the adjudication thereby with respect to the improvements and ameliorations ; and the Court here doth order that the record be remitted to the said Court, and that by experts to be named by the parties in the usual manner, within fifteen days of the rendering of this judgment, in failure thereof by the Honorable the resident Judge in the district of Saint Francis, on the application of either of said parties, after notice duly given to the other of them or his attorney *ad litem*, the said experts to name a third expert or umpire in case of difference of opinion between them, or by the Judge, on their disagreeing on the nomination of such umpire or

third expert, the said improvements or ameliorations made as aforesaid by said defendant during the time of his occupation of said lot of land and premises, shall be valued and ascertained, together with the value of the rents, issues and profits of the said lot and premises by the said defendant during his said occupation, and report the same to the said Circuit Court, on or before the first day of the session of the said Court, in the month of May next, to be proceeded and adjudged upon by the said Circuit Court according to law, the costs upon this appeal to abide the final judgment to be rendered in this cause.

The *expertise* was subsequently had, and final judgment was rendered in the Circuit Court, in the same terms as the former judgment, homologating the report of experts and awarding to the defendant £130 for compensation for improvements, being the amount ascertained by the said experts, after deduction of the rents, issues and profits of the land during his occupancy thereof, and granting him permission to retain possession till this sum was paid.

SANBORN, J. S., for plaintiff.

TERRILL, T. LEE, for defendant.

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By the report of distribution, the Quebec Building Society were collocated in preference to Little for £63 7, amount of the principal claimed by him, and, upon the balance of the proceeds, Little was collocated to the exclusion of the Quebec Building Society's claim for £8 2 7, the costs aforesaid.

**TESSIER**, for the Quebec Building Society :—Contested the report upon the ground that the costs were an accessory to the principal obligation, and that the obligation having been enregistered before the rendering of the judgment mentioned in Little's opposition, the Quebec Building Society had a right to be collocated for its costs in preference to Little, and he maintained that by a *proviso* in the 30th clause of the ordinance 4th Vict., ch. 30, it was enacted that costs of suit would carry with it an hypothec, without express mention of the amount of costs in the registration, that it followed from this principle, that the costs were considered as an accessory of the principal ; therefore, in the present cause, the obligation in favor of the Quebec Building Society being registered before the judgment of Little, the costs awarded to the Quebec Building Society must precede Little's collocation. That the opinion prevailing heretofore that costs ought to carry hypothec only from the date of the registration of the judgment was founded upon the *commentaires* of writers on the article 2148 of the Code Napoleon ; but it was there enacted that no hypothec would exist for costs, except when the specific amount of costs was registered, making it a principal by itself instead of an accessory. The difference between the two rules was well explained by Troplong (1).

**CAMPBELL**, for Little :—Contended that if the pretension of the Quebec Building Society were maintained, it would be supporting a doctrine diametrically opposed to the whole of the principle upon which the registry ordinance was founded—namely, *publicity* and *specialty*, that the principle the Quebec Building Society was contending for was : “ That “ a posterior enregistered hypothec should take precedence “ of an anterior one duly registered.” That one of the three principles laid down in the 20th section of the registry ordinance, was that the sum of money intended to be secur-

(1) *Privilèges et Hypothèques*, 2nd vol., Edition Belge, page 106, No 702 :—*Arrêts de Lamoignon*, t. 2, p. 123 :—*Louet*, Lettre D., sec. 42 :—*Pénil Régime Hypothécaire*, art. 5155.

ed by the hypothec should be specified therein, and that these costs not being a tacit hypothec under the 29th section of the ordinance, were no exception to the general rule laid down by the 20th section, and consequently could not take precedence of the deed of obligation, and that this point had already been settled by this Court favorably to the pretensions of Little in a case at the hearing of which his honor the Chief-Justice presided, namely, in the case of *Morin vs. Daly*, most fully reported in the *Lower-Canada Reports*, vol. 6, p. 48.

Judgment :—The contestation maintained and the prothonotary ordered to amend the report so as to give the Quebec Building Society a preference for the said costs.

**ANDREWS, CAMPBELL and ANDREWS**, for Little,

**TESSIER**, for Quebec Building Society.

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## COUR DE CIRCUIT.—QUEBEC.

Présent :—CHABOT, Juge.

No. 9. { PAQUET *et al*,..... Requéranis.  
 et  
 { ROBITAILLE *et al*,..... Intimés.

Robitaille, préfet du comté de Québec, s'était nommé lui-même pour présider l'élection municipale de Charlesbourg, et au jour indiqué, Glackemeyer, le plus ancien Juge-de-Paix, prétendant que la nomination de Robitaille était illégale, s'était emparé de force de la présidence, et avait procédé à une élection, aidé d'un parti qui avait expulsé Robitaille de la chambre du poll; ce dernier avait de son côté procédé à une élection dans une pièce voisine hors la présence de la majorité des électeurs, et après avoir enregistré quatre votes, avait déclaré son élection close à cause du trouble :—

Jugé :—1o. Que Glackemeyer n'avait point droit de s'emparer de la présidence, quand bien même la nomination de Robitaille eût été illégale, et qu'en conséquence l'élection faite par lui était nulle.

2o. Que le plus ancien Juge-de-Paix n'a droit de présider qu'en l'absence de la personne nommé par le préfet.

3o. Que l'élection faite par Robitaille était nulle comme ayant été faite hors la présence de la majorité des électeurs assemblés, et après un commencement de votai on terminée prématurément.

Robitaille, warden of the county of Quebec, had appointed himself to preside the municipal election of Charlesbourg, and on the day fixed, Glackemeyer, the senior Justice of the Peace, assuming that the nomination of Robitaille was illegal, had forcibly installed himself as president, and had proceeded with the election, assisted by a party who had expelled Robitaille from the polling place; Robitaille on his part had proceeded with an election in an adjoining room, without the presence of the majority of the electors, and after polling four votes, had declared his election closed by reason of violence :—

Held :—1o. That Glackemeyer had no right to instal himself as president, even admitting the illegality of Robitaille's appointment, and that therefore the election presided over by him was void.

2o. That the senior Justice of the Peace can only preside in the absence of the person appointed by the warden.

3o. That the election presided over by Robitaille was void inasmuch as it had taken place in the absence of the majority of the electors assembled, and had been prematurely terminated after the polling had commenced.

Jugement rendu le 26 Mars 1858.

Les requérants, par leur requête basée sur les dispositions de la 18me. Vict. cap. 100, sec. 35, (Acte des municipalités et des chemins du Bas Canada de 1855) demandaient que l'élection de Robitaille, et autres, comme conseillers municipaux de la paroisse de Charlesbourg fut déclarée nulle. Ils alléguaient comme principale raison que le préfet du comté de Québec n'avait point nommé une personne pour présider l'élection, et qu'en conséquence, Edouard Glackemeyer, écuyer, avait pu légalement présider cette élection, et que de fait sous sa présidence, comme le plus ancien juge de paix, sept conseillers, autres que les intimés, avaient été dûment élus. Ils ajoutaient que l'é-

lection des intimés, faite à peu près dans le même temps, et au même lieu, sous la présidence d'Edouard Robitaille, était nulle, parcequ'elle avait été faite après celle présidée par le juge de paix Glackemeyer, parceque Edouard Robitaille n'avait aucune qualité pour présider, et aussi parce qu'il avait procédé clandestinement et hors la connaissance des électeurs municipaux. Ils concluaient à ce que l'élection de Robitaille, et autres, fut déclarée nulle, et à ce que celle de Jérémie Bédard, et autres, présidée par Glackemeyer, fut déclarée bonne et valable.

A cette requête les intimés répondirent, entre autres choses, qu'Edouard Robitaille, étant le préfet du comté, avait dûment notifié les électeurs municipaux que le onze de janvier aurait lieu l'élection municipale pour la paroisse de Charlesbourg, et que lui-même présiderait cette élection ; qu'au jour indiqué il s'était rendu pour procéder à cet effet ; qu'Edouard Glackemeyer, écuyer, était venu lui disputer la présidence en sa qualité de plus ancien juge de paix, prétendant que la nomination de Robitaille était illégale, et s'était emparé de force du local où devait se faire la dite élection, et avait illégalement procédé à élire Jérémie Bédard, et autres ; qu'expulsé violemment, Robitaille avait procédé à l'élection des intimés dans une autre pièce, laquelle élection s'était faite unanimement, que la prétention du dit Glackemeyer de présider était illégale, attendu que le plus ancien juge de paix n'a droit de présider que lorsque la personne nommée par le préfet est absente. Les réquerants n'étaient pas les sept conseillers élus sous la présidence de Glackemeyer mais dix personnes se disant électeurs et autorisées par le dit acte des municipalités et des chemins, 35 sec. 2<sup>me</sup> sous sec., à poursuivre telle contestation. Le reste des faits de la cause et des questions qu'elle a présentées apparaissent suffisamment dans les observations du juge.

CHABOT, Juge :—Une assemblée des électeurs de la mu-

nicipalité de Charlesbourg fut convoquée par Ed. Robitaille comme préfet du comté de Québec.

Cette convocation paraît régulière ; au moins personne ne s'en plaint.

Par cette convocation le même Ed. Robitaille est nommé pour présider à cette assemblée ; un parti des électeurs, après consultation sans doute, croient que Robitaille n'a pas droit de présider l'assemblée et s'adressent à Ed. Glackemeyer, juge de paix, qui partage leur croyance.

Le jour de l'assemblée, le 11 janvier 1858, M. Glackemeyer avec quelques électeurs, se rend au lieu de l'assemblée et trouve Robitaille avec son Greffier préparé à présider l'assemblée, M. Glackemeyer, comme le plus ancien juge de paix, prétend que c'est à lui de présider ; Robitaille persiste dans sa présidence ; Glackemeyer insiste de son côté ; et sur ce, Robitaille assermente des constables spéciaux et les commande de mettre Glackemeyer à la porte, les constables se mettent en devoir d'expulser Glackemeyer ; il s'en suit du tumulte et une lutte ; Glackemeyer est mis à la porte.

Quelques instants après Glackemeyer rentre suivi d'un plus grand nombre d'électeurs qui se pressent vers la table où était Robitaille, on dit à Glackemeyer de ne pas craindre qu'on peut le défendre ; la foule repousse Robitaille qui est frappé, et poursuivi dans la chambre voisine.

Voilà les faits principaux et sur lesquels les deux parties s'accordent ; c'est-à-dire que leur preuve réciproque donne le même résultat. Sur ce dernier fait il y a quelque différence dans les témoignages : des témoins disent qu'on a crié tue, tue, écrase ou étouffe le, en parlant de Robitaille, et un témoin même va à dire que c'est Glackemeyer qui a proféré ce langage. La Cour croit que d'après tous les faits constatés, ce témoin peut se tromper et se trompe réellement. Mais cela ne peut influer sur le jugement de la Cour.

La Cour ne peut que regretter des scènes semblables à la présente qui font peu d'honneur à ceux qui y ont pris part. La Cour a vu surtout avec regret qu'un officier public tel que M. Robitaille, le préfet d'un comté, un juge-de-peace, représentant la puissance publique dans une occasion aussi solennelle, ait fait usage d'un langage non seulement inusité, pour ne pas dire grossier et insolent, envers M. Glackmeyer et quelques électeurs de la municipalité, mais dérogatoire à la dignité de la charge qu'il exerçait alors.

Mais venons directement aux questions que la Cour doit décider :

Les requérants ont-ils raison de dire que Jérémie Bédard, et autres, ont été élus légalement conseillers de Charlesbourg?

Ou bien, sont-ce les intimés ?

Ou bien, l'élection présidée et faite par Glackmeyer est-elle légale ou non ?

M. Robitaille a-t-il fait une élection, et la dite élection est-elle légale ?

En un mot y a-t-il eu une élection légale faite le 11 janvier ou non ?

D'abord prenons l'élection alléguée avoir été faite par Robitaille.

M. Robitaille ayant été repoussé dans la chambre voisine de celle du poll, procède à une élection en présence de quelques électeurs, dans une chambre autre que celle du poll. Les électeurs dans la chambre du poll n'en ont aucune connaissance et il proclame les intimés dûment élus unanimement, et les intimés prétendent que cette élection est bonne et légale. La Cour ne peut partager l'opinion des intimés. D'abord cette élection est subreptice et non faite en présence des électeurs mais à leur insu, d'ailleurs il n'y a que quelques témoins, qui sont contredit par le

livre de poll, qui disent que M. Robitaille a clos l'élection à cause du trouble, le livre est signé de M. Robitaille et de son greffier. L'élection est close après l'enregistrement de quatre voix, et aucun candidat n'est proclamé.

Au reste quand même le livre de poll dirait que les intimés ont été proclamés élus, on ne pourrait s'empêcher de dire que ce n'est pas une élection, mais un semblant d'élection.

L'élection donc de Robitaille doit être mise de côté.

Maintenant passons à l'élection faite et présidée par M. Glackemeyer ; on a prétendu que M. Glackemeyer n'était pas domicilié à Charlesbourg, mais à Québec, la cour est d'opinion que, d'après la preuve, M. Glackemeyer est domicilié à Charlesbourg et qu'il avait le droit d'assister à l'assemblée des électeurs de Charlesbourg. Mais ce n'est pas là la question principale. Avait-il le droit de présider l'assemblée dans les circonstances dont il s'agit ? M. Robitaille était nommé pour présider, c'est vrai qu'il s'était nommé lui-même, et l'on dit qu'il n'avait pas ce droit. La Cour n'est pas appelée à décider si vraiment M. Robitaille avait le droit de se nommer ainsi pour présider, puisque de fait il n'a pas présidé. Mais la Cour est appelée à décider si M. Glackemeyer était juge compétent pour décider cette question. La Cour est d'opinion que M. Glackemeyer n'était pas juge compétent. Une personne était nommée pour présider l'assemblée, elle était en devoir de présider, et ni M. Glackemeyer, ni aucun nombre d'électeurs, n'avait le droit par force ou autrement de décider ce point. La conduite de M. Glackemeyer est sans doute de bonne foi, mais elle n'en est pas moins reprochable et illégale. Le statut ne donne au plus ancien juge de paix le droit de présider qu'en l'absence de la personne nommée par le préfet. Dans le cas actuel la personne nommée était présente. M. Glackemeyer n'avait donc pas le droit de présider. La conduite de M. Glackemeyer et du parti qui le soutenait, pai-



sible en apparence au commencement, n'en est pas moins blâmable. Il est bien évident que l'intention du parti était d'empêcher Robitaille de présider, et cette intention a été mise à exécution. La Cour ne peut sanctionner un procédé semblable. Ce serait permettre à chacun de prendre la loi en main et se rendre justice à soi même. De là naîtrait des difficultés, des voies de faits, en un mot un renversement de toute justice. Si M. Robitaille n'avait pas le droit de présider les électeurs pouvaient se faire rendre justice sans se porter à des voies de faits. Si M. Robitaille était empêché par la force de procéder à l'élection, il avait son remède en loi et il n'était pas en son pouvoir d'adopter les procédés qu'il a suivis. La Cour en est donc venue à la conclusion que l'élection présidée par M. Glackemeyer est illégale, comme celle présidée par M. Robitaille, et que toutes deux doivent être déclarées nulles.

Le jugement est comme suit :—

La Cour, etc. Considérant qu'une assemblée des électeurs municipaux de la municipalité de la paroisse de St. Charles de Charlesbourg, dans le comté de Québec, dans le district de Québec, a été dûment convoquée par le préfet en exercice du dit comté de Québec pour l'élection de sept conseillers municipaux de la dite municipalité, laquelle assemblée était fixée au onze janvier mil huit cent cinquante-huit :—

Considérant que la dite convocation est régulière, et qu'avis public en a été donné suivant la loi :—

Considérant que d'après les faits résultant de la preuve, il est constant que les nommés en la requête des requérants, savoir : Jérémie Bedard, Joseph Urbain Bedard, Jacques Jobin, Pierre Trudelle, Jean Delage dit Lavigueur, Louis Paradis et Joseph Villeneuve n'ont pas été élus légalement conseillers municipaux pour la dite municipalité, et que les intimés, savoir : Édouard Robitaille, Lewis Carmichael,

Patrick Humphrey, Pierre Bedard, Charles Jobin, Pierre Chalifour et Etienne Lefebvre, n'ont pas non plus été élus légalement conseillers municipaux pour la dite municipalité, le dit jour, onze janvier mil huit cent cinquante-huit, casse et annulle l'élection faite, et tous et chacuns les procédés faits et adoptés au sujet d'icelle élection, le dit onze janvier mil huit cent cinquante-huit, relatifs à la dite élection de conseillers municipaux pour la dite municipalité, en conformité à la sus-dite convocation et avis sus-dit, et casse et annulle la nomination et proclamation des personnes sus-nommées pour être conseillers municipaux de la dite municipalité, et leur fait défense, et à chacun d'eux, de prendre le titre de tels conseillers municipaux et d'agir comme tels ; et la Cour ordonne qu'une nouvelle élection ait lieu, sans délai, suivant la loi.

Et la Cour ordonne que chaque partie paie ses frais ; et la Cour ordonne que copie du présent jugement soit signifiée au préfet du comté de Québec, à la diligence des requérants.

**TESSIER**, pour les requérants.

**TASCHEREAU**, pour les intimés.

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**SUPERIOR COURT.—DISTRICT OF ST. FRANCIS.**

Before DAY and SHORT, Justices, and DRISCOLL, Assistant-Judge.

No. 655. { DUNKERLY,..... *Plaintiff.*  
vs.  
McCARTY,..... *Defendant.*

**Held:—**That when two proprietors upon the same stream possess water powers of which one cannot be improved without the destruction of the other, the first occupant must have the preference and is entitled to have an abatement of the dam of the other.

**Jugé:—**Que quand deux propriétaires possèdent sur le même cours d'eau des places de moulins, sur lesquelles l'un ne peut construire des moulins sans que l'autre ne fasse tort à l'autre, le premier occupant doit avoir la préférence et a le droit de demander que l'autre soit contraint à démolir sa chaussée.

Judgment rendered the 27th. October 1855.

**SHORT, Justice:—**The plaintiff claims to be the owner of a mill and mill site upon lot No. 10, in the sixth range of Durham, upon Black river running through lots ten and eleven, the latter lot being owned by defendant. The plaintiff claims the right to the free use of his privilege as the first occupier. Both lots were derived from the estate of the late Thomas Scott. Twenty years ago one Nunns occupying by permission of the curator to Scott's estate, built a dam and erected a saw mill upon the present site of the plaintiff's dam and mills. About fifteen years ago, when Nunns' mill had gone into decay, one Morrill erected a dam upon the site where the defendant's dam now stands on lot No. 11. There is no pretension or proof that Morrill had any rights other than as a squatter, it is in evidence that the agent of the proprietor objected to the erection of a dam by Morrill, and never recognized No. 11 as possessing any mill privilege. In 1849 the plaintiff acquired lot number 10, repaired the dam erected by Nunns and erected a saw mill and fulling mill upon the site. At this time the dam built by Morrill on lot No. 11 had gone to decay, and there was no obstruction to the working of the plaintiff's mill. In 1853 the defendant rebuilt the dam upon lot No. 11, the plaintiff protested against it as an infringement of his right. It has not been clearly

determined whether the defendant's dam was higher than the old one, this fact is, however, clearly proved, that after the erection of the defendant's dam the plaintiff's mill was impeded by back water and rendered useless to a great extent. The plaintiff claims, as proprietor of lot No. 10, and as proprietor of the water power thereon, as having given an enhanced price for the land by reason of such water power and as *premier occupant*, that he has a right to the unimpeded use of the said privilege, and demands abatement of the obstruction erected by the defendant.

The defendant does not make a positive defence, but denies the right of the plaintiff, and avers that the plaintiff's damage arises from the unskilful construction of his mill, the plaintiff has established by proof his allegations, and the defendant has not proved that he had any privilege upon No. 11, on the contrary, it clearly appears in evidence that it has always been considered that there was no water power upon No. 11, and the defendant acquired the lot with this understanding, and the price of his lot was estimated upon this presumption. An *expertise* has been ordered, and by the report it appears that the plaintiff's and the defendant's dams cannot coexist, one of them must yield to the other. This gives rise to a question of law; does the first occupation of the plaintiff entitle him to the undisturbed possession of his dam? The Court think it does. When two proprietors upon the same stream possess water powers, one of which cannot be improved without the destruction of the other, the first occupant must have the preference, the conclusion then is inevitable, there must be an abatement of the defendant's dam, the plaintiff asks that the defendant be ordered to remove his dam, and, in default of his doing so, that the plaintiff be permitted to do it. The Court think that although they cannot give more, they can award less than the plaintiff demands, and consequently the judgment will be that the defendant do, within one month, remove his dam so as to leave the water below the plaintiff's mill to flow in its origi-

nal channel, and, in default of his doing so, that it be taken down by the sheriff of this district and that he do pay £50 damages and costs of suit.

The following is the judgment:—

The Court &c.—Considering that the defendant hath failed to prove any of the matters and things in his said exception, in this cause filed, contained, and that the plaintiff hath established by evidence that he is the lawful proprietor of a mill site, dam and wool carding mill and saw mill erected upon the river known as the Black river, running through and upon lot number ten in the sixth range of the township of Durham, in the district of St. Francis, and that he hath established by evidence that he hath, so far as regards the defendant in this cause, as the first occupant, the right to the unimpeded use of the waters of said river to carry his said mills upon said lot number ten in the sixth range of the township of Durham; and considering that it appears in evidence, as well as by the report of Frederick C. Cleeve, William N. McCullough and Patrick Daly, *experts* named in this cause, and homologated by the Court on the 22nd day of October instant, that the defendant did, in the summer of the year one thousand eight hundred and fifty three, and prior to the institution of this action, illegally, and against the will and consent of said plaintiff, erect upon lot number eleven in the said sixth range of said township of Durham a dam upon said Black river below the plaintiffs dam and mills, whereby the waters of said Black river were caused to flow back upon the wheels and machinery of plaintiff's said mills, by reason whereof the same were and are impeded and greatly damaged, and will continue so to be as long as said dam of the said defendant remains in its present state, and by reason whereof the said plaintiff hath been greatly damaged, doth dismiss the said exceptions of the said defendant, and doth order and adjudge that the defendant, within one month of the service of this judgment upon him, do lower, reduce and abate his said dam upon the said

Black river on lot number eleven in the sixth range of the township of Durham, and all obstructions erected thereon by him, to such extent as to leave the waters of said Black river below plaintiff's said mills to flow away therefrom in their original channel, and in default of his so doing, that such dam and obstructions be so as aforesaid lowered, reduced and abated, at the costs and charges of said defendant, by the sheriff of the district of St. Francis, and doth adjudge and condemn the defendant to pay and satisfy to the plaintiff, for his damages occasioned by the defendant's erecting his said dam, the sum of fifty pounds current money of this province, with interest thereon from this day, and costs of this suit.

SANBORN, J. S. for plaintiff.

WEBB, W. H. for defendant.

FELTON & MORRIS, counsel for defendant.

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SUPERIOR COURT:—QUEBEC.

Before:—BOWEN, Chief-Justice.

No. 614. { BOURASSA,..... Plaintiff.  
vs.  
{ HAWES,..... Defendant.

Held:—That an affidavit for *saisie arrêt* in which the word "*celer*" is used instead of the word "*recevoir*," and the latter word erased in the body of the affidavit, and the former put in the margin, and not referred to in the jurat, is good.

Jugé:—Qu'un affidavit pour *saisie-arrêt* dans lequel l'on se sert du mot "*celer*" au lieu du mot "*recevoir*," et ce dernier mot biffé dans le corps de l'affidavit, et le premier mis en marge, sans mention du renvoi dans le jurat, est suffisant.

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Judgment rendered the 6th April, 1858.

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Holt, on behalf of the defendant, moved to quash the writ of *saisie-arrêt* in the cause, on the ground that the affidavit upon which it issued was not in conformity with the form prescribed by the statute; that it was not sworn to in the

said affidavit that the defendant was about to secrete his estate, debts and effects, but that on the contrary, the affidavit being in French, the word "*receler*" had been employed in the body of the affidavit and had been subsequently erased, and the word "*celer*" inserted in the margin; that the word "*receler*" was essential to entitle a plaintiff to the issuing of a writ of *saisie-arrêt*; that it was the term employed in the statute regulating the issuing of writs of *saisie-arrêt*, and that unless it were sworn that the defendant was about to "*receler*" his effects, a party was not entitled to the issuing of the writ; that the word "*celer*" did not convey the same meaning as the word "*receler*," and that although a party might be about to "*celer*" his effects, yet it might be done openly and in perfect good faith, and with no intention whatever to defraud his creditors, and that such an act would not place him in the position contemplated by the statute, so as to give any of his creditors a right to seize and arrest his effects; that the object of the law it was quite apparent, was to prevent a debtor from fraudulently making away with his effects in order to defraud his creditors, and for this purpose the word "*receler*" had been used, he therefore considered the word "*receler*" as essential, and inasmuch as the plaintiff had not used it in the affidavit the writ of *saisie-arrêt* ought to be quashed. That it would also be found on reference to the affidavit, that the word "*celer*" could not even be considered as forming part of the affidavit, for it was in the margin only, and no mention or reference to it whatever was made in the jurat; this he also considered a fatal objection.

Dechène, in showing cause against the motion, argued that in using the word "*celer*" he had complied in the strictest manner with the requirement of the statute. That the signification of the word "*celer*" was to secrete, to conceal, put away or hide; that upon reference to a very recent publication, and one of high authority on this

subject, (1) it would be found that the word "*celer*" conveyed this signification, if possible, more distinctly than the word "*receler*;" that it meant to secrete, carry away, hide or conceal; that under the word "*receler*" it would also be found that the two words were synonymous in point of signification; that it was true, that in the statute the word "*receler*" had been used in preference to the word "*celer*," but this was no reason why the latter term should not be considered equally good, or that for that reason it should be considered as having lost its signification; he contended that the word "*celer*," which he had used in the affidavit, was a much more correct term than the word "*receler*," and that for this reason he had erased the latter word from the affidavit and had inserted the former; that with respect to the objection that the erasure and marginal note in the affidavit had not been mentioned in the jurat, he maintained that it was not necessary, inasmuch as the prothonotary had affixed his initials to the marginal note when subscribing the jurat, and that the erasures could not invalidate the allegations in the affidavit.

*Per curiam*, on reference to the authority cited, there will be found a difference in the signification of the two words. The word "*receler*" is the proper and more correct term, and is also the word used in the statute. There is not such a difference, however, as to justify the Court in quashing the writ of *saisie-arrest*. With respect to the objection that the erasure and marginal note in the affidavit are not mentioned in the jurat, the Court is of opinion, that, inasmuch as the prothonotary's initials appear affixed to the marginal note, the necessity of mentioning the erasures and marginal notes in the jurat is obviated.

PLAMONDON and DECHÈNE, for plaintiff.

HOLT and IRVING, for defendant.

(1) *Flamming et Tibbins, Grand Dictionnaire, Français-Anglais, vbo. Celer, Ed. 1867.*



## SUPERIOR COURT.—QUEBEC.

Before :—CHABOT, Justice.

No. 1930. { *BÉGIN et al.* ..... *Plaintiffs*,  
                   vs.  
                   { *BELL et al.* ..... *Defendants*.

Held:—That a motion for permission to put in special bail, after the expiration of eight days from the return day, which does not set forth special grounds in support thereof, cannot be received.

Jugé:—Qu'une motion pour permission de donner cautionnement spécial, après l'expiration des huit jours ensuivant le rapport d'un writ, laquelle motion n'énonce aucune raison spéciale au soutien d'elle, ne peut être reçue.

Judgment rendered the 1st. March, 1858.

This case was submitted upon a motion made on behalf of John Bell, one of the defendants, arrested under a writ of *Capias*, on the 12th. November, 1857; the motion was as follows:

“ Motion on behalf of John Bell, one of the defendants in  
 “ this cause, that he be permitted to put in special bail.”

Upon showing cause against the motion it was contended, that it could not be granted, inasmuch as it did not set forth special matter in support thereof. That the 12th. section of the 12th. Vic., cap. 42, provided that applications of this nature, made after the expiration of eight days from the return day, should be granted upon special application and sufficient cause shewn; that the rules of practice prescribed that all motions founded on special matter should contain the grounds of such motion, and that no grounds, not set forth in such motion, should be allowed to be urged in support thereof, and that inasmuch as the defendant in this cause, had not set forth any special grounds in his motion, and could urge none not so set forth, that therefore the motion could not be granted.

In support of the motion it was argued, that the defendant was entitled to the application, and that the motion, as it

stood, was quite sufficient for the purpose, and referred the Court, in support of this view of the case, to the case of Campbell and Atkins, decided in Appeal.

In reply, it was alleged that a case more strongly in point in support of the position of the plaintiffs than the one quoted, could not possibly be found, for in that case, as well as in the case of Owen and Wyse, of 1856, the motion for permission to put in special bail not only specified the special grounds in support thereof, which were of the strongest nature (alleging misrepresentation on the part of the sheriff), but was also supported by *affidavit* in which the same special reasons were sworn to; so that the case referred to, if it had any application whatever to the present case, could only be urged against the motion.

CHABOT, Justice:—The terms of the 12th. section of the Act cited are positive; they enact that applications of this nature shall be special and only granted upon sufficient cause shewn; now, there are no grounds whatever set forth in the present motion, and therefore I hold that it must be rejected.

POPE, R., for plaintiffs.

HOLT and IRVINE, for defendants.

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## SUPERIOR COURT.—QUEBEC.

Before :—MEREDITH, Justice.

No. 998. { NAUD DIT LABRIE *et al.*.....*Plaintiffs.*  
 vs.  
 { CLÉMENT DIT LABONTÉ.....*Defendant.*

Held:—That title deeds of property, which do not describe its extent, cannot give or determine limits to acts of possession, but place the alleged possessor in virtue of such title deed, in the same position as if he had no title whatever.

Jugé :—Que des titres de propriété qui n'en indiquent pas l'étendue, ne peuvent déterminer les limites dans lesquelles l'on a fait des actes de possession, mais tels titres mettant le possesseur supposé de telle propriété dans la même position que s'il n'avait pas de titre du tout.

Judgment rendered the 9th. January, 1858.

Th plaintiffs brought an *action possessoire* by which they sought to recover damages for alleged trespass by the defendant, upon land in the possession of them the plaintiffs as proprietors.

The defendant pleaded, that for more than a year and a day previously to the alleged trespass, he was in possession, as proprietor, of the lot of land in question, by virtue of a valid title from the Crown. Upon this issue the parties proceeded to proof.

The facts of the case will appear from the following observations :

MEREDITH, Justice :—This is a possessory action ; and the plaintiffs, by their declaration, allege that for several years before the trespasses of which they complain, they were possessed as proprietors of a tract of land in the seignior of Lauzon, and which, from the evidence, would seem to contain between 300 and 400 arpents, and to include the lots Nos. 1, 2 and 3, on the plan marked P, filed in this cause.

The defendant, by a peremptory exception, alleges that the acts of which the plaintiffs complain were done by

him on the lot No. 2, above referred to, of which he was possessed as proprietor under a valid title from the Crown, for more than a year and a day before the date of the alleged trespasses of which the plaintiffs complain.

The plaintiffs and the defendant have produced their titles, as they had a right to do, not that, in this case, any question of property can be determined ; but in order to throw light upon the acts of possession relied on by the parties, and to characterise those acts. The rule on this subject is laid down by Garnier (1).

From the titles thus produced, and the other documentary evidence, it appears that in the year 1799, the Hon. Henry Caldwell, then seignior of Lauzon, conceded a piece of land in the parish of St. Henry, lying between two marshes, *plaines*, and forming as to superficial contents a land of about six arpents in front, by thirty in depth.

The land thus conceded afterwards came into the possession of Isabella Reid, who made subconcessions to the extent of about 300 arpents ; the subconcessions so made being contained within the letters A, B, C, D, E, A, on the plan P ; after the making of these subconcessions, Mrs. Reid made a further subconcession to one Michel Morrissette, by an *acte sous seing privé*, in the following terms :  
 " Québec, 30 oct. 1842.—Je reconnais avoir cédé à Michel Morrissette, pour valeur reçue, un lot de terre dans Lauzon, le reste de la pointe adjoignant la terre de M. Louis Turgeon, et les personnes de St.-Jean-Baptiste. Comme je n'ai pas une connaissance parfaite suffisante de ces lots, j'ai seulement pris la parole du dit Morrissette, qu'il y avait tel lot ; en conséquence de quoi, je dois être considérée

(1) *Traité des actions possessoires*, page 369 : " Il n'y a point cumul par cela seul que les intéressés et les juges se fondent sur l'état des lieux, les dispositions légales, ou des titres qui établissent la propriété ou le droit des parties lorsque ces circonstances n'ont servi qu'à éclairer le possessoire, à déterminer le caractère de la possession, à décider à qui elle doit profiter, et à résoudre les doutes que les enquêtes auraient pu laisser sur le fait de savoir à qui des deux parties elle appartient."

Voyez aussi Garnier, pp. 130 and 122 ; and Curasson, pp. 85, 242, 243.

"innocente dans le cas où il n'y aurait pas tel lot—ce qui doit être entré dans le contrat par le notaire."—Signé, Isabella C. Reid.

Michel Morrisette, a few weeks afterwards, sold to one Isaac Fortier, who, on the 26th. March, 1844, sold to the plaintiffs.

The conveyance to the plaintiffs, which was made in consideration of £9 0 0, describes the premises conveyed thus : " *Un lopin qui est situé en la paroisse St. Henry, à prendre depuis la terre de Louis Turgeon, cultivateur de la paroisse St. Henry, à aller au haut des terres du trait quarré de la concession de St.-Jean-Baptiste de la seigneurie Lauzon, circonstances et dépendances.*" Acting under this deed, which purports to convey a "lopin de terre," the plaintiffs contend they obtained possession of a tract of land, exceeding in extent three hundred arpents. So that, according to the pretensions of the plaintiffs, the representatives of Alexander Fraser are in possession of more than 600 arpents, although the grant to him was of 180 arpents. Whilst the title of the plaintiffs is thus under review, with reference to their possession, it is of importance to observe that that title does not in fact designate any extent of land whatever. There are but two lines given in the deed, and on reference to the plan P, it will be found that these lines form an angle, so that it is plainly impossible to know what extent of land was intended to be conveyed.

The title of the defendant is a concession from the Crown, bearing date the 4th day of August 1851, that being about a year and a half before the alleged trespasses.

The depositions of the witnesses, which are very numerous and lengthy, establish that between the year 1844, when the title of the plaintiffs bears date, and the autumn of 1851, when the defendant obtained a concession from the Crown, the plaintiffs cut and sold timber upon numerous

occasions, and on several portions of the tract of land of which they claim possession ; and more particularly that in the winter of 1850 and 1851, they cut on some parts of that land a considerable quantity of timber required for the Point Lévi Church—about the same time, one of the plaintiffs erected a hut or shed, *chantier*, in which he lived when cutting the timber in question ; and he kept the key of this hut, until it was burned, a short time before the institution of the present action. The plaintiffs did not, however, clear, or fence in, or otherwise enclose any part of the tract of land in controversy.

One witness proves that in the spring of 1853, he and another cut down for the plaintiffs the wood of about an arpent of land, so as to prepare it for being cleared ; but this was after the first of the trespasses of which the plaintiffs complain, and their claim must necessarily rest upon their alleged *possession annale, before the date of those trespasses*.

On the part of the defendant it is proved that a short time after the date of the concession from the government to him, namely, in the month of December, 1851, he caused the side lines between him and his neighbours to be regularly run by a provincial surveyor, and that both those lines were blazed throughout their whole extent ; that during the following winters (1851 and 1852, and 1852 and 1853), he cut timber upon the lot conceded to him ; and the plaintiffs allege that during the last mentioned winter (that of 1852 and 1853), the defendant caused one of the plaintiffs to be fined for entering upon the same lot. It was in consequence of the defendant having done this, and of his having continued to claim the lot conceded to him by the government, that the plaintiffs have brought the present action.

Such are the most important facts proved ; and after giving to them and the whole of the evidence the most careful consideration, I have come to the conclusion that the action cannot be maintained.

In the first place, I hold that the plaintiffs can derive no benefit from the title which they have produced. The principal use to the plaintiffs of a title in the present case, would have been to ascertain and determine the extent of the property to be affected by their acts of possession. The deed produced by them, as already explained, does not describe any particular extent of property, and therefore cannot have the effect of giving limits, as it were, to their acts of possession. The plaintiffs contend that the object of that deed was to convey to them a tract of land comprehending the three lots marked 1, 2 and 3, respectively, on the plan P. The defendant, on the other hand, contends that the "lopine de terre" intended to be conveyed by that deed, is the piece of land of an irregular figure lying within the letters A, B, C, F, A, on the plan P, and containing about 100 arpents. It is impossible to say which of these pretensions is nearest the truth, all that is certain in this respect about the deed, is, that it does not describe any certain tract of land; and therefore, in so far as regards the present action, the plaintiffs are in the same position as if they had not produced any title whatever.

Being then of opinion, as I am, that the plaintiffs have not shewn even a *prima facie* title to the tract of land in dispute, I further hold that they could not, by cutting timber from time to time on different parts of that tract, acquire a possessory right to the whole of it, so as to enable them to maintain an action such as the present.

The difference that exists between the effect of an entry upon land with title, and the effect of an entry upon land without title, is very important, and is clearly established by the best authorities. Troplong says "Lorsque la possession est fondée sur un titre, on en règle l'étendue sur la portée du titre même; c'est lui qui sert à l'interpréter et à en fixer la portion, (1)" and the same

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(1) *Traité de la Prescription* No 277.

author at No. 251 says "un usurpateur ne serait pas censé avoir possédé la chose qu'il prétend avoir acquise par prescription s'il ne l'avait occupée pied à pied et d'une manière patente," and Curasson p. 96 observes, "La possession annale serait aussi vainement invoquée par celui qui, sans se livrer à l'exploitation d'un canton de bois, appartenant à autrui, y serait allé couper quelques arbres çà et là. Le propriétaire seul, muni d'un titre, pourrait faire considérer de pareils faits comme des actes de possession ; de la part d'un tiers, ils sont équivoques et ne pourraient être considérés que comme des délits."

The same principles have been acted upon frequently by the Courts in the United States, and as those courts have had the most ample opportunities of considering all questions connected with the possession of wild lands, their decisions on this subject are entitled to great respect. In a note at page 53 of Adams on Ejectments, I find three american cases cited as deciding, "that where one enters into land having title, his seizin is not bounded by his actual possession, but is co-extensive with his title. But where he enters without title his seizin is confined to his possession by metes and bounds" and in the case of Jackson vs. Warford cited in the following page of the same volume, the Court "bounded the possession of a person without title, to what he had under actual improvement.

Applying these principles, which are founded in justice, to the present case, it is plain that we cannot bound the possession of the plaintiffs by their title, because that title does not give the boundaries of any certain tract of land ; nor can we assign limits to that possession by the aid of metes and bounds, because they did not by their acts of possession fence in, or enclose, in any way, the whole or any part of the tract in controversy ; and it is equally impossible to declare the possession of the plaintiffs co-extensive with their improvements, for in fact they made none deserving of the name. I do not lose sight of the small



*abattis* supposed to have been made by the plaintiffs in the spring of 1853, but, the making of that *abattis* was, as already observed, after the alleged *trouble* by the defendant, and therefore cannot in any way influence the result of the present suit. I also bear in mind the erection of a hut by the plaintiffs, but the erection of this hut, the site of which did not occupy the 300th part of an arpent, by a party without title, cannot extend his possession beyond the land it actually occupied; and considered with reference merely to the land covered by the hut itself, the matter is obviously of too little importance to engage the attention of the Court.

It was also contended by the defendant that the possession of the land during the year and day prior to the alleged grievances, was in him and not in the plaintiffs; but as it appears to me that the plaintiffs have failed to show that they ever had such a possession of the tract of land in question as would enable them to maintain the present action, I think it needless to consider the other points urged by the defendant.

I will merely add that as the defendant entered upon the lot which he claims, not only under a title from the Crown, but after an application formally made by the plaintiffs for the same property had been considered and rejected, (1) he might reasonably hope that he could do so, without giving the plaintiffs any just cause of complaint; and that under these circumstances it is the duty of the Court to examine the alleged possession of the plaintiffs, with even more than ordinary care.

Curasson (p. 84) observes " L'usurpateur qui dénué de titre fait valoir sa possession annale contre le vrai propriétaire doit être vu moins favorablement; c'est à son égard surtout qu'il faut examiner si la possession est légitime, et réunit tous les caractères voulus par la loi."

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(1) As to effect of this application by the plaintiffs, see Curasson pp. 83, 89.

For these reasons I am of opinion that the plaintiffs action must be dismissed with costs.

CASAUULT and LANGLOIS, for plaintiffs.

TASCHEREAU, J. T. for defendant.

SUPERIOR COURT.—SHERBROOKE.

Before :—SHORT, Justice.

No. 778. { CHAPMAN,..... Plaintiff.  
vs.  
{ CLARK *et al*,..... Defendants.

Held :—That a superior mill owner has no right to obstruct a river which is *navigable et flottable* and used for floating timber, by constructing a boom across such river, and that parties owning mills lower down the river whose logs are detained by such boom have a right, after reasonable notice, to demand to be allowed to pass with their logs, to open the boom and allow their own logs to pass down the river, and are not responsible for the damages caused thereby to the persons obstructing the river by reason of his logs being carried down the stream.

Jugé :—Que le propriétaire d'un moulin supérieur n'a pas le droit d'obstruer une rivière navigable et flottable et dont on se sert pour descendre des billots, en barrant telle rivière avec un *beaume*, et que des individus propriétaires de moulins inférieurs, les billots desquels sont retenus par tel *beaume*, sont en droit, après avis raisonnable et demande faite pour permission de passer leurs billots, d'ouvrir tel *beaume* et d'y passer leurs billots pour descendre la rivière, et qu'ils ne sont pas responsables des dommages causés à la personne obstruant la rivière, les billots de telle personne ayant été emportés par le courant.

Judgment rendered the 27th. January, 1858.

This was an action of damages by which the plaintiff claimed of the defendants £750 0 0, for having, as he alleged, on the 10th. and 17th. June, 1856, by themselves, their agents and servants, opened and broke the plaintiff's boom in the River Saint Francis, at Lennoxville, and allowed logs belonging to the plaintiff, held in the said boom, to drift down the river and become lost to him. The plaintiff also claimed damages for loss of profits which he would have made upon logs belonging to other parties, then in his boom, and which he, the plaintiff, had contracted to saw. To this the defendants pleaded :

1stly. That the River Saint Francis was *navigable et flottable*, and consequently a public highway, and that the plaintiff had no right to obstruct the said river by throwing a boom across it, and was, in so doing, himself a trespasser.

2dly. And amongst other things—That most of the plaintiff's logs were lost on a day prior to the 17th. June, when the defendants were driving logs, and which was not complained of by the plaintiff; and further, that the plaintiff had put his logs, which were comparatively few in number, into the river just before the defendants' *drive*, for the purpose of causing them to be driven by the defendants, at their expense, and when they reached the plaintiff's boom, he stopped all logs both his own and the defendants' and refused to allow the defendants' to pass; that the defendants had a large number of men who were compelled to remain idle during the time the logs were stopped; that the water was falling rapidly, and that they, the defendants, would have had great difficulty in getting their logs down to their mill, which was some 10 miles below the plaintiff's mills, if they had been detained any length of time; that on the 10th. June, they did not break the boom, but it was broken by the force of the logs, and many of the logs passed or were driven under the boom by the force of the current; that the boom was insufficient and badly constructed, and logs were constantly carried past it; that on the 17th. June, the defendants' men only opened the boom after requiring the plaintiff to assist them in separating the logs, for which purpose they offered to aid them, and after the plaintiff had refused to open the boom (which obstructed the whole river) so as to allow the defendants' logs to pass, but persisted in keeping it closed.

3rdly. General issue.

The parties went to proof upon the merits; the evidence was very lengthy, and in some respects conflicting, but the points decided will be seen from the following observations:

SHORT, Justice :—This is an action of damages brought by the plaintiff against the defendants for having, on the 10th. and 17th. June, 1856, opened and cut his boom on the River Saint Francis. It is a case of great importance to parties lumbering upon the St. Francis, and great attention has been given by the Court to the evidence adduced, although the Court is of opinion that it was not necessary to examine all the evidence with great care. The plaintiff alleges that the defendants, by themselves, their agents and servants, broke and opened the plaintiff's boom on the River Saint Francis, and allowed his logs to drift down the stream and become lost. The allegation of the declaration, as far as regards the first occasion complained of (the 10th. June), is not what it should be. It is simply alleged that the defendants broke the boom without stating that it was without the plaintiff's consent, or unlawfully, or illegally ; on the second occasion, it is alleged that it was against the consent of the plaintiff. The plaintiff also claims damages for loss of profits on other logs which he had contracted to saw, but does not allege what those profits were. The Court considers this damage too remote. The consideration of the Court has been directed to the damage done on the 10th. and 17th. June. The defendants pretend that the plaintiff had no right to construct a boom obstructing a river which they say is *navigable et flottable*, and also that most of the plaintiff's logs were lost in a drive prior to those complained of, and that the plaintiff, who had a small quantity of logs, took occasion to put these logs into the river immediately before the defendants' drive, in order to compel the defendants to drive them down the river. The evidence shews that the defendants built large mills and booms, at Brompton, some 10 miles below the plaintiff's mill ; that subsequently the plaintiff built his mill and boom across the River Saint Francis in Lennoxville. That on the 10th June, the defendants had several millions of feet of lumber which had come down to the plaintiff's boom, and the plaintiff had only a small quantity ; the proportion of the defendants' logs to the

plaintiff's being about 20 to 1. There were three *drives* : the first, under Lord ; the second, under Richardson ; and the third, under Lord ; of the first drive under Lord, no complaint is made. It is clearly shewn, that a portion of the plaintiff's logs come down the river in the first drive, what portion came down on the 10th. June does not appear. It appears also, that there was a sluice in the boom for separating logs ; but whether it was for the benefit of the plaintiff or of all parties does not appear. On the 10th., the boom was forced up and was broken, and three fourths of the logs passed under the boom ; but there is no evidence to show that the boom was broken by the defendants' men, and the witnesses all say that it was then impossible to assort the logs.

On the 17th., the evidence goes to show that the boom was opened by Lord, the foreman, and that when the drive arrived, a portion of the logs had been passed through the sluice, and it was afterwards closed, and the plaintiff when requested by Lord, the foreman, refused to open the boom, Lord, after giving the plaintiff time to open the boom, and after he had declined to do so, opened the boom, and allowed the logs to pass through.

The question arises : had the plaintiff any right to place a boom across the river ? To decide this, we must first inquire what kind of a river it was. Was it *publici juris*, a highway, *navigable et flottable* ? The Court holds that it was. It is not a river the bed of which belongs to the riparian proprietors. If a highway and for the use of the public, has any one a right to obstruct it ? It is clear that, as the law now stands, such a river cannot be obstructed so as to prevent its free use. The 14th. and 15th. Vict., cap. 102, clearly shows this. The 6th. Vic., cap. 17, imposes a penalty for causing any obstructions in rivers. The 16th. Vic., cap. 191, extended to Lower Canada by the 18th. Vic., cap. 84, authorizes a number of persons, not less than five, to form themselves into a company and to erect booms,

slides, etc., etc., but *not in a navigable river*, clearly showing the object was to prevent obstructions.

The plaintiff in this cause had the same rights as the defendants, but he must use them without injuring other parties or obstructing the navigation of the river; and because he had the right to use the stream, it does not follow that he had a right to prevent one from using it who had twenty times as many logs as he had. He had no right to erect a boom so as to inconvenience others or impede the navigation of the river. Besides, there is nothing to show that the plaintiff is a riparian proprietor. The question then comes up if the plaintiff had no right to obstruct the river by his boom, were the defendants justified in raising the boom so as to allow their logs to pass? The Court is of opinion that they were, that they had a right to abate a common nuisance in the same manner as a traveller on the highway would have a right to remove a gate or obstruction in order to enable him to pass without waiting the tardy process of the law.

There is no evidence in this cause, if the Court were disposed to give judgment for the plaintiff, to enable it to fix the amount of damage, and it is not shewn what quantity of logs went down the river on the occasions complained of.

Plaintiff's action dismissed with costs.

HOLT and IRVINE, attorneys for plaintiff.

RITCHIE, T. W., counsel.

SANBORN and BROOKS, attorneys for defendants.

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## SUPERIOR COURT. — QUEBEC.

Before :—BOWEN, Chief Justice.

No. 216. { FOSTER *et al.*..... *Plaintiffs.*  
                   vs.  
                   DORION *et al.*..... *Defendants.*

Held :—That, in the case submitted, the petition for attachment, under the provisions of the 12. Vic., cap. 42, s. 8, was sufficient and could not be dismissed on demurrer.

Jugé :—Que, dans l'espèce, la requête pour emprisonnement, en vertu des dispositions de la 12<sup>me</sup> Vic., ch. 42, sec. 8, était suffisante et ne pouvait être renvoyée sur défense au fonds en droit.

Judgment rendered the 6th. April, 1858.

The plaintiffs filed a petition for attachment, under the provisions of the 12th. Vic., cap. 42, sec. 8, alleging that the defendants had, after the institution of the action and before the making of the statement filed by the defendants, as well as within thirty days next preceding the institution of the action, secreted a large portion of their property, exceeding in value £2000, with the intent to defraud their creditors, namely : that at the city of Quebec, during the year 1856, and the fall of the year 1855, while they, the defendants, were well known to be in a state of insolvency, they made over clandestinely for cash and money securities, convertible and converted into cash by them, to divers persons, among others to Beer Jacobs and others, their stock in trade, with the express intent to cheat and defraud their said creditors ; and that they did, by such means, cheat and defraud the plaintiffs and other creditors.

The defendants severally demurred to this petition. Fournier, in support of the demurrer, maintained that in a petition of the nature of the present, having for its object the restraint of the liberty, and the imprisonment of the subject, the allegations ought to be clear, distinct and precise ; that more particularly where allegations of fraud were necessary, they should be set forth with the utmost certainty and explicitness, even in ordinary cases of civil pro-

cedure, and still more so in cases like the present, which partook more of a criminal character, the penalty going to deprive the party petitioned against of his liberty ; that the allegations of fraud, in this petition, were not sufficiently set forth ; that the time, manner, place and means by which the alleged act or acts of fraud had been committed, ought to have been specifically set forth, so that the peculiar character of the act might be judged of from the manner and circumstances under which it had been performed ; that there were two defendants in the cause, and that it was not stated in the petition which of the two it was that committed the alleged act or acts of fraud referred to in the petition ; that even admitting all the allegations of the petition to be true, they would not be sufficient to sustain it under the provisions of the above cited act, because it was alleged that the defendants sold or made over their stock in trade to others ; now, this act, among people in business, did not imply fraud, because the business of the defendants as merchants was to sell their stock in trade ; and therefore the petition, to entitle the plaintiffs to its prayer, ought to have gone further, and have shewn that the defendants' proceedings were fraudulent, and in what way they were fraudulent.

*Per Curiam*.—Cannot the plaintiffs do this in their statement of facts ?

No, they cannot allege any thing in their statement of facts, not contained in the petition.

BOWEN, Chief Justice :—I am of opinion, nevertheless, that the allegations of the petition are sufficient, and that the demurrer cannot be maintained.

ANDREWS, CAMPBELL and ANDREWS, for plaintiffs.

FOURNIER and GLEASON, for defendants.



## SUPERIOR COURT. — QUEBEC.

Before :—BOWEN, Chief-Justice.

No. 1779. { ROULEAU..... *Plaintiff*.  
 vs.  
 { BACQUET..... *Defendant*.

Held:—That an articulation of facts which contains matter not to be found in the pleadings, or matters admitted by such pleadings, is nevertheless good.

Jugé :—Qu'une articulation de faits qui contient des matières qui ne sont pas énoncées dans la déclaration ou dans les plaidoyers, ou des matières admises par tels plaidoyers, est valable.

Judgment rendered the 5th. April, 1858.

The cause was heard upon a motion on behalf of the plaintiff to reject the defendant's articulation of facts from the record, on the ground that it was too diffuse, and contained matter not to be found in the declaration or plea in the cause, and also matter not denied by the pleadings.

Tessier, in support of the motion said, that upon reference to the motion, it would be found that the articulation of facts partook more of the character of a plea than any thing else ; that it repeated in their entire many of the allegations in the plea, some of which were not denied by the pleadings. He contended that an articulation of facts ought to be short and concise, and as specific as the nature of the facts to be proved in the cause would admit ; that in France, from which country the practice of filing statements or articulation of facts had doubtless been taken, the practice was to make articulation of facts short and precise (1). That nothing should be alleged in the articulation that was not denied by the pleadings, and which it was not necessary to prove ; that otherwise the articulation of facts would be a pleading, and the opposite party would also have to insert in his answer to the articulation of facts of his adversary, a number of statements equally discursive and argumentative ; and that in fact, the articulation of facts would, in

(1) Dalloz, vo. Articulation de Faits.

such case, only be a renewal or repetition of the declaration or plea as the case might be, and the opposite party, to prevent any of these allegations from being taken as admitted, would have to put in an answer to the articulation, equally partaking of the character of a plea, and as argumentative as the pleadings in the cause.

Chambers, against the motion, contended, that if there were any allegations in the articulation, which were not denied by the pleadings, or which he could not prove, from the circumstance of their not being contained in the declaration, such allegations were mere surplusage, and did not vitiate the statement of facts; but he denied that any allegation would be found in the articulation of facts, which was admitted by the pleadings in the cause, or which he could not prove.

BOWEN, Chief Justice :—The articulation of facts might certainly have been more concise than it is, but this is merely surplusage, and I think quite in keeping with the law itself, which enforces such a practice as that of filing articulations of facts. What does the articulation of facts amount to? It amounts to this: that you have to repeat in every cause, the pleadings which have already been filed therein. It is a practice which serves no object, and is perfectly useless. I therefore think that the articulation in this cause is good, though it is perhaps longer than it might have been; but nevertheless, I consider that it is in compliance with the terms of the law, which makes such a practice necessary.

TESSIER, for plaintiff.

CHAMBERS, for defendant.

QUEEN'S BENCH, }  
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before :—SIR L. H. LAFONTAINE, Baronet, Chief Justice,  
DUVAL and CARON, Justices.

GALLAGHER ..... *Appellant.*

and

ALLSOPP ..... *Respondent.*

Held :—That, in the case submitted, the appellant, a tenant of M., rightly brought his action against the respondent, a neighbouring proprietor, as and for *voie de fait*; the latter having permitted rubbish to accumulate for a number of years against the partition wall between his property and that occupied by the appellant, and thereby caused the said wall to fall over on the premises occupied by the appellant.

Jugé :—Que, dans l'espèce, l'appelant, locataire de M., était en droit de porter une action pour *voie de fait* contre l'intimé, propriétaire voisin des lieux occupés par l'appelant; l'intimé ayant depuis plusieurs années permis l'accumulation de décombres contre le mur de séparation entre sa propriété et celle occupée par l'appelant, cette accumulation ayant causé la chute du mur sur les lieux occupés par l'appelant.

Judgment rendered the 14th. March, 1858.

This was an action instituted by the appellant, plaintiff in the Court below, to compel the respondent, proprietor of the premises adjoining those in the occupancy of the appellant as the tenant of one James Motz, to remove a quantity of rubbish, ruins and other materials, from the yard of the premises so occupied by the appellant, which had been thrown therein, by reason of the negligence and carelessness of the respondent, who allowed such quantities of rubbish to collect in his own yard, and to be thrown up against the wall dividing the two premises, that the said wall was thereby thrown down, and the stones thereof together with the rubbish so piled up against it, were thereby thrown and projected into the appellant's yard, and there allowed to remain, to his annoyance and injury, although he frequently requested the respondent to remove and take away the same, but which the respondent refused to do.

The declaration concluded by praying, that in default of the respondent's removing the said ruins and rubbish from the yard of the appellant, within such delay as the Court

should fix, that he, the appellant, should be authorised so to do, at the cost and charges of the respondent; and further prayed for a condemnation of £25 as and for damages by the appellant suffered, by means of the nuisance and loss of the use of a portion of the yard in question, without prejudice, however, to his claim or right of action, for any further injury or damage he might suffer by reason of the premises.

The respondent, by peremptory exception, pleaded that the wall in question was a *mur mitoyen* between the respondent and the proprietor of the premises occupied by the appellant, and that if ever it fell, at any time, it was in consequence of its age and natural decay, and from the rolling down, in considerable quantities, of stones and gravel from the cape, and was not occasioned by the act or negligence of the respondent or his tenants, and that, therefore, the appellant, being a tenant, had no right of action against him the respondent, to compel him to remove the ruins or rubbish in question, nor to repair nor rebuild the said wall, and concluded by praying for the dismissal of the action.

The evidence established that the wall in question was *mitoyen*, and was thrown down by the stones and rubbish which had been piled up against it by the tenants of the respondent, the stones and rubbish in question being composed, partly of the excavations from a sewer dug in the respondent's yard, and partly from the stones and gravel which, for some years previously, had been gradually falling down from the cape, and which the tenants of the respondent had been in the habit of throwing up against the wall with the other rubbish piled up against it.

For the appellant it was contended, that from the tenor of the judgment, and from the allegations in the respondent's exception, it was evident that the nature of the appellant's demand was misunderstood. That there was a misapprehension by the respondent of the action, may be gathered from the statements in his plea, that, *as tenant*, the appellant

had no action to compel him, the respondent, to rebuild or repair the said wall, since the appellant sought for neither the rebuilding nor the repairing of the wall, but simply for the removal of the ruins from his premises, and on the supposition that he did not mistake the object of the appellant's action, he was then in error as to the law, inasmuch as it is alleged in his said exception, that because the wall was in common between him and Motz, the appellant had no action, whereas that fact of it's being a *mur mitoyen*, must be perfectly immaterial to the appellant's right to compel the removal from his premises, occupied as tenant, of the remains of the wall precipitated upon them by the negligence of the respondent, for doubtless, it will not be contended that the appellant's right of action to cause the respondent to remove an incumbrance and nuisance placed upon the appellant's premises could be affected by the circumstance of the materials causing the nuisance being common property, or that the question of property in them, could at all arise in the cause. The respondent was then evidently wrong as to his proposition of law, unless indeed, which was more probable, he was, as before stated, under a misapprehension of the thing asked for by the appellant, it being supposed by him, that the reconstruction or repair of the wall in question was demanded, while in fact it was simply the carrying away of its ruins from the property occupied by him, two things totally distinct, and having no relation the one to the other.

The respondent's exception, however, contained other averments amounting to a denegation of those in the appellant's declaration, such as that the wall fell by reason of its age and natural decay, and that its destruction was not caused by the negligence or acts of the respondent or of his tenants, and had the allegations been proved, or had not the appellant established the reverse, his declaration would have been unsustained by evidence, and his action would consequently have been unfounded. Now the truth or false-

hood of these statements made on the one side and denied on the other, and the amount of damage suffered by the appellant, if his statements were shown to be true, were the only issues of fact between the parties, and the only ones to be adjudicated upon by the Court below, while also the sole issue of law upon the verified allegations of the appellant's declaration was this,—had he, as *tenant*, an action against the respondent to compel him to abate a nuisance which, through his fault, had been cast upon the premises demised to the appellant, and of which premises he was then in possession ?

The Court below seems also to have been drawn by the pleading of the respondent beyond the questions at issue, and to have considered the appellant's demand to be the *re-construction* of the wall in question, instead of the *removal of the ruins*, while at the same time the appellant contends it has doubly erred in its appreciation of the evidence adduced, in coming to two incorrect conclusions. 1st. That the falling of the wall was not the effect of any act committed by the respondent or his agents ; and 2dly. That the nuisance complained of, was the result of the natural falling of stones from the cape. It will be observed that the former of these propositions, includes one of law, as well as of fact, namely : whether, under the circumstances, the respondent's tenants were not in the eye of the law, his agents, and it is submitted, that neither of these statements of fact will be found to be substantiated by the evidence of record in the cause, while at the same time, the appellant is advised, had both these allegations been established, still it would not follow that the judgment of the Court dismissing his action, was correct.

It would not be required for the maintenance of the appellant's action, that the respondent should have *committed any act* by which the wall was thrown down, his *non-feasance*, his omission to do that which he ought to do, whereby it was destroyed, would render him amenable,

and although the destruction of the wall might have been occasioned by the natural descending of stones from the cape above it, his liability would have still existed if he could, by prudent measures, have prevented this mischief to his neighbours, that is, unless the falling stones had amounted to a *force majeure*.

Now, whether it was or not by the erroneous pleading of the respondent that the Court was led to the consideration of that which was not before it, and therefore to a conclusion unsatisfactory to the appellant, it is evident that it was conceived his action was instituted for the re-edification of the wall in question, since the Court in its judgment says : " the plaintiff, as *tenant*, has not established any legal right of action ; " and it appears probable by the grounds assigned in the judgment, that the Court would, had it considered it proven that the overthrow of the wall had been caused by *the act* of the respondent, have maintained the appellant's supposed action and ordered its rebuilding. There can be no occasion however now to consider whether such a suit for the reconstruction of the wall would even under those circumstances have been founded in law, there was in fact no such demand made by the appellant.

The Court below in denying the appellant's right of action, assumes for grounds of such decision, that the wall was not demolished by any act of the respondent or of his agents, but by the natural falling of stones from the cape above the property. It is respectfully proposed then by the appellant to draw the attention of the Court to the facts of record and then to the principles of law applicable to them, and it is conceived that the case will not require much consideration to discover that the judgment of the Court below was erroneous and ought to be reversed.

The evidence summed up amounts to this, that the respondent, for a period of upwards of 23 years, by himself and his tenants, so uses his property that he permits dirt and

rubbish to increase thereon and suffers it, together with the excavations from a sewer on his premises, to be piled by his tenants to the height of twenty-four feet against his neighbour's wall, that he is not even ignorant of this, but promises to cause the removal of the nuisance, and fails so to do, in consequence of which neglect on his part, the wall in question is precipitated upon the premises occupied by the appellant who is thus from the month of April, 1856, until the bringing of his action deprived of the use of a great portion of the property by him leased. Under these circumstances, can it be supposed that the law affords no remedy? The appellant is not so advised, but on the contrary is led to consider that it gives him a threefold redress, the one by action against his own landlord, the others against the respondent's tenants and the respondent himself, and so judging he made his election and instituted his action against the person he considered the most in fault, and the one consequently upon whom the effects of his illegal conduct must ultimately fall, by which proceeding a circuity of actions was avoided.

Now, it is well known that the obligations of the lessor towards his lessee are not the same as those of neighbouring proprietors or tenants towards each other. The landlord is by law bound to *cause* his tenants to enjoy the thing leased (1). The neighbour, whether proprietor or tenant, is merely like all the world under the obligation to *permit* him to enjoy it, so that when the appellant contends he has an action against his landlord Motz, he means not the *actio injuriarum*, because both by the old and modern law of France, "Le bailleur n'est pas tenu de garantir le preneur du trouble que des tiers apportent par des voies de fait à sa jouissance, sans prétendre d'ailleurs aucun droit sur la chose louée." (2). But an action such as it would be competent to a lessee to institute against his lessor on ac-

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(1) Code, Art. 1719. Poth, Louage, No. 53.

(2) 6 Marcadé, p. 458 :—Pothier, Louage, No. 81.



count of the total or partial loss of enjoyment of the thing leased by reason of a *vis major*, such as a tempest or fire rendering necessary something beyond such repairs as it is incumbent upon tenants to make (*réparations locatives*), or such a case as the present, whereby the appellant is deprived of a large portion of his premises by the tortious acts of his neighbours, which, as to the appellant, is a *force majeure* that he could not prevent.

Yet, although the legal obligations of the neighbouring proprietor or occupier is not in any wise to *cause* his neighbour to enjoy his property, he is still legally bound to permit him so to do, and if he does not the *actio injuriarum* would lie against him, he is bound by all law so to use his own property as not to annoy his neighbour, he is not only held not to *commit* any illegal act injurious to him, but not to suffer any thing to be done or to remain upon his premises, no matter by whom committed or how cast there, if noxious to another, the law would not permit him to cause any offensive matter to be placed upon his premises, or to remain there if accidentally or otherwise cast upon them, but by such conduct he would render himself liable to an indictment for a nuisance, as well as to an action for the private injury, and would be compellable to remove the same, and this obligation and these liabilities, it is apprehended, would be common to the owner and to the occupier of the property.

It cannot be doubted that had the respondent permitted his wall to fall through age, whereby the adjoining tenant had been injured, he would be amenable for the damages which would ensue, then suppose the wall to have been common, a *mur mitoyen*, his liabilities would be none the less, but his co-proprietor would be also liable towards the person injured, and if the wall, instead of being prostrated from age or natural decay, should be forced down by the suffering to gather about it or to be piled against it by his tenants, who occupied the premises year after year, such

quantities of rubbish as collected in the yard adjoining, would not the proprietor be at the least equally liable for the damages thereby caused as if its fall had been occasioned by natural decay? Again, supposing that the respondent should not be amenable for his *non-feasance* in that respect, the only semblance of difficulty in holding him responsible would be the rendering him liable for the acts of his tenants, and here the appellant respectfully submits that he should be so held, *respondeat superior*, is the language of the law of reason. The respondent possessed his property by his tenants. The relation of superior and subordinate existed between them. Blackstone, in his Commentaries, states: "I may lawfully enter my neighbor's land, and peaceably pull down that which is an unlawful annoyance to me." Certainly then a landlord may enter upon his own property for such purpose. The appellant contends the respondent not only had the right to do so, but that he was bound to see that his tenants so possessed his property as not to injure their neighbours. The continued acts of his tenants from year to year, done with his knowledge, which he might have prevented and which were done in reality as tenants, and with a view by them of enjoying the premises by procuring a passage to the rear of them, were surely adopted by him, and became his own acts and within the meaning of the law, the acts of his tenants were the acts of his agents or servants, "c'étaient des actes commis dans l'exercice des fonctions auxquelles ils étaient préposés." In a case to be found in the English Law and Equity Reports, (1) it was held that where a party contrary to the directions of an overseer had felled trees, which became a nuisance to another, the overseer was responsible, because he knew of the act and gave no directions to have the nuisance removed. The appellant contends that the wall was in fact destroyed by the neglect of duty of the respondent, and that wherever

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(1) 16 Law and Equity Reports, p. 446, in note.

there is a disregard of duty there is liability to an action. He knew of the accumulation of dirt and stones upon his premises, and even if he knew it not his ignorance would not excuse him, he was bound to know it. If the wall had been unsafe from natural decay, it would not have availed him to plead ignorance of the fact, then if stones were piled against it, year after year, his ignorance of that fact would not excuse him, he was bound to see that it was not in a dangerous state from any cause. But it is established in evidence, not only that he was well aware of the state of the premises, but that he promised to remove that, which, for the want of removal, caused the destruction of the wall. The appellant does not suppose that the mere voluntary promise on the part of the respondent would give rise to any legal obligation, but he submits that no such undertaking would have been made by him without the existence of an obligation, and he believes that such obligation did exist towards *any individual* to whom the materials were likely to cause an injury. Ch. Baron Pollock, in a case reported in the English Law and Equity Reports for 1854, vol. 26, page 532, asks if a party can leave a thing where mischief is likely to occur and get rid of his liability by abandonning it there? and he answers no, wherever there is *control and management*, there is *liability*. Will it be said that the respondent had not the control and management over the materials collected on his premises, and rendering them almost uninhabitable, and his buildings or wall dangerous to his neighbors? Marcadé, in his Comments upon the art. 1385 of the Code Napoléon, which enacts that the owner of an animal is answerable for the damage caused by such animal, says: " Cette règle de l'article 1385, ne s'appliquerait pas aux animaux libres dans les bois puisqu'ils ne sont pas la propriété de celui sur le terrain duquel ils reposent," and adds, " sans doute, les *propriétaires* ou *fermiers* des terres voisines auxquels nuirait la trop grande abondance du gibier, pourraient se plaindre, mais au lieu de pouvoir placer le

“ défendeur sous le coup de l'article 1385, ils ne pourraient  
 “ invoquer que les articles 1382, 1383, et n'obtiendraient  
 “ une indemnité qu'en prouvant que c'est par la faute de  
 “ leur adversaire que le gibier s'est accru outre-mesure.” (1)

Pothier says, : “ On appelle *délits et quasi délits* les faits  
 “ illicites qui ont causé quelque tort à quelqu'un d'où naît  
 “ l'obligation de les réparer.” (2) Merlin, in his Rep. de  
 Juris., states : “ C'est l'indemnité ou dédommagement qu'on  
 “ doit à la personne à qui l'on a causé quelque préju-  
 dice.” (3) And Denisart says : “ Dans tous les cas où il  
 “ s'agit de savoir s'il est dû des dommages et intérêts, et  
 “ en quoi ils consistent, il faut considérer la qualité du fait  
 “ qui a causé le dommage, la part que peut y avoir celui à  
 “ qui on l'impute, son intention, et quelles ont été les suites  
 “ du fait, c'est sur ces vues et sur celles des circonstances  
 “ particulières, que les juges doivent, par leur prudence,  
 “ décider les questions de cette nature.” (4) There is also  
 a case reported in the Journal des Audiences. vol. 4, page  
 767, of an action against the owner of a mill brought by the  
 adjoining proprietor for damage done him by the miller's  
 tenant in trespassing upon his garden and pilfering his  
 fruit, in which judgment was rendered in his favor, but  
 was reversed in appeal, because “ il n'y avait ni *complicité*,  
 “ ni *connaissance*, ni *tolérance*, et qu'enfin l'appelant n'avait  
 “ *point vu la chose, ni pu l'empêcher*.” In fine, though the  
 general rule of law is, that “ Tous délits sont personnels,”  
 the exception is where the act of commission or omission is  
 within the knowledge of the party who could have prevented  
 the mischief ; Merlin lays it down : “ Celui qui, par sa  
 “ *négligence* ou la *négligence* de ceux dont il doit répondre,  
 “ cause du dommage à autrui, est obligé de le réparer,”  
 and adds, “ la même décision s'applique à ceux qui causent

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(1) 5 Marcadé, p. 283.

(2) Introduction Gén. aux Couts, No. 110.

(3) 4 Rep. de Jurisp., vbo. Dommages-Intérêts, p. 26.

(4) 2 Col. de Dec. Nouv., p. 171, No. 6.

“ du dommage parce qu'ils ignorent les choses qu'ils devaient savoir.” (1)

The appellant has shewn that the wall in question was prostrated by the rubbish in the respondent's yard ; that alone, without tracing more specifically the further suffering it to be heaped against the wall, establishes a *prima facie* case of negligence on his part, and the *onus probandi* lies on him to establish that the accident arose from some inevitable *vis major*, if such had been the case ; this he has not done. Courts of Justice are instituted to afford a remedy for wrongs suffered, and this Honorable Court especially, to give relief where, through error of judgment, injuries remain unremedied : the appellant then seeks from this Court that redress for the damages by him sustained at the hands of the respondent, which from the Court below he has failed to obtain.

For the respondent it was maintained, that the wall in question being a *mur mitoyen*, and having fallen from old age and the natural falling of stones from the cape, that the proprietor of the premises occupied by the appellant, alone had a right of action against the respondent for the reconstruction of the wall in question, upon his offering to contribute one half of the expense of such reconstruction ; that the tenant had no right to any such action. (2) That the Court below had adopted this view of the case, and that the judgment was correct, and ought to be confirmed.

The only question was whether Allsopp was guilty of a trespass or *voie de faits* towards the Appellant, which evidently he was not !

AYLWIN, Justice, *dissentiente* :—Said he had the misfortune to differ from the majority of the Court in this case. His Honor here recited the allegations in the declaration and pleadings, and said, that the Court below dismissed the action upon the merits, and he thought very properly,

(1) Rép. de Jurisp., vbo. Dommage, p. 25.

(2) Toullier, vol. 3, Nos. 204, 207, 213 and 214.

that he would have dismissed the action upon demurrer. His Honor here remarked, that there was a difference between the old law of France taken from the Roman Law, and the modern law of France, upon this subject ; that the contract of sale and lease of the modern law of France, was not the contract of sale or lease of the old Roman Law ; that under the latter the proprietor had much greater power than was given to him by modern French legislation ; that, to entitle a plaintiff to an action such as the appellant in this case had instituted, it was necessary that he should be in possession of the premises injured or encumbered, and that a tenant was not in such possession, was most clearly laid down by Pothier (1), and also by Marcadé. That under the terms of the lease of the premises in question, the appellant had a perfect right to proceed against his landlord, apart from any right the law afforded him. His Honor then remarked, that upon looking at the evidence adduced in the cause, he found it of the most extraordinary character, for upon reference to the evidence of Mr. Motz, who was the proprietor of the premises occupied by the appellant, it appeared that the appellant himself was under the impression that his recourse was against his own landlord, for he went to complain to him about the nuisance in question ; and Mr. Motz, upon that, wrote to the respondent, who, he says, undertook to remove it ; that the damage was differently estimated, and some of the witnesses must have had an extraordinary idea of the value of a pig pen, for the appellant kept four pigs, and the witnesses swore that the damage he suffered by being unable to keep these four pigs in his yard, was as much as £40, some even say £50. His Honor concluded by remarking that he was of opinion that the judgment of the Court below was a right one ; and that a tenant had no right of action against third parties in cases of this description.

DUVAL, Justice :—The Court below, in my opinion, has

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(1) *Contrat de Louage*, No. 91.

misconceived the action. The appellant, plaintiff in the Court below, brought his action against the respondent, alleging that in consequence of his negligence and carelessness in allowing a quantity of stones and rubbish to collect on his premises the wall dividing the two properties was thrown down, and precipitated into his yard, to his great annoyance and inconvenience ; and that notwithstanding that he had frequently requested him, the respondent, to remove the rubbish and ruins from his yard, that he had always refused to do so, whereby he had suffered damage. Now, with these facts before us, for these allegations have been fully proved by the appellant, how can it be conceived for a moment that the proprietor of the premises occupied by the appellant, would have a right of action against Allsopp, the respondent ? This is an action of *voie de fait* ; it is not an action for trouble in the enjoyment of his premises against which, by law, his landlord is bound to protect him. There is a wide distinction between the two cases, and this distinction will be found to be laid down in Pothier, *Traité du Louage*, Nos. 81 and 287 ; and the same doctrine will be found laid down in Troplong, Duvergier and Dalloz ; and in this particular, there is no difference between the old and the modern law of France.

Applying the principle here laid down to this case, could Allsopp pretend that he would have a right to throw down the wall whenever he thought proper, and that the adjoining tenant would have no right of action against him ? No. The proof adduced in this case establishes that the wall in question was thrown down by the negligence of the respondent in allowing the rubbish to accumulate and to be piled up against the wall in question, and all the authorities above mentioned draw the distinction between actions for *voie de fait*, and actions for the legal rights of tenants against proprietors. Suppose, for instance, that Allsopp had taken a pickaxe and thrown down the wall, would

Motz have had a right of action against him? No; the tenant, as possessing in fact, has a right of action for *voie de fait*. The Court below, therefore, misconceived the action. The tenant had a perfect right to bring the action against Allsopp, as well as if any one had, passing his house, broken his windows.

CARON, Justice :—The distinction between actions for *voie de faits*, and for trouble in the enjoyment of the premises leased is clearly laid down by all the authorities cited; and this is an action for *voie de fait*;—the declaration alleges that the damage was suffered by the negligence and carelessness of the respondent, therefore he alone is liable. As to the questions of fact, they are clearly proved. It is proved that the wall dividing the two properties was thrown down, not by the gradual falling down of gravel and stones from the cape, but by the respondent, as the stone fell each year, piling it up against the wall; and more than this, it is in proof that the respondent caused a sewer to be dug in his yard for his own convenience, and the dirt and gravel from the excavations of which he also threw up against the wall, which also contributed to its fall. Under these circumstances, is the respondent not liable to the tenant, directly, for the loss of the use of his yard? I am of opinion that he is. This action was rendered necessary and was occasioned by the neglect of the respondent, who would not go to the expense of carting away the rubbish, but rather preferred to throw it against the wall. If the appellant, under these circumstances, had brought his action against his landlord, he would have pleaded, look to the person whose act is the cause of the injury of which you complain, I have nothing to do with, and am not responsible for his acts of negligence or carelessness, not to say malice. All the authorities agree in saying that where the act of the third party is a *voie de fait*, the tenant has his action direct. (1)

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(1) Dalloz, Louage, 238.



As to the question of damages, I would have been disposed to grant more than the court has awarded, as it is proved to be from £25 to £40, but as the other members of the Court have thought £15 sufficient, I concur in the judgment.

Sir L. H. LAFONTAINE, Bt. C. J :—It will be found that in the question involved in this case, the old and modern law are precisely the same. Because here, it is not a question of trouble by loss of enjoyment, or diminution of enjoyment, or other trouble, by which the party causing the trouble, claims a right to do so, in which case the tenant has a right of action solely against his proprietor ; the present action is for *voie de faits*, and the distinction between the two cases is clearly laid down by all the authorities.

The written Judgment of the Court, condemned the respondent in £15 damages, and fixed a day within which he was to remove the rubbish in question from the premises occupied by the appellant, in default of which, the appellant was authorised to remove it at the cost and charges of the respondent.

ANDREWS, CAMPBELL and ANDREWS, for appellant.

LELIEVRE and ANGERS, for respondent.

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QUEEN'S BENCH, } DISTRICT OF QUEBEC.  
 APPEAL SIDE.

Before :—SIR L. H. LAFONTAINE, Baronet, Chief Justice,  
 AYLWIN, DUVAL and CARON, Justices.

McMASTER ..... *Appellant.*

and

WALKER *et al* ..... *Respondents.*

Held :—That where three chains are attached together for the purpose of delivery, they compose one whole, and delivery of any one will not be held made, until all three shall have been delivered.

Jugé :—Que lorsque trois chaînes sont jointes ensemble pour être ainsi délivrées, ces chaînes n'en font qu'une, et que livraison ne sera censée complète que lorsque les trois chaînes auront été délivrées.

Judgment rendered the 12th. March, 1858.

This was an appeal from a judgment rendered in the Superior Court, at Quebec, in a case wherein the respondents, plaintiffs in the Court below, sued the appellant, defendant in the Court below, for the sum of £269 2 8, being the value of two chains, which together with a third chain, according to the allegations in the declaration, the appellant, as master of the steamship "Anglo-Saxon," had received from the respondents in Liverpool, on board of the said steamship, in good order and condition, as per bill of lading, and had undertaken to deliver to the respondents, or their assigns, in the like good order and condition, at Quebec ; but which he neglected and failed to do ; and that while the said three chains were still in his charge and custody, in the port of Quebec, two of the same were, by the carelessness and negligence of the appellant, lost overboard and sunk.

The appellant pleaded that the three chains in question were delivered to the respondents on or about the 6th. of October, 1856, in the same good order and condition in which they had been shipped ; that they were safely discharged from the said steamship and delivered to the respondents, at Quebec, in the same good order and condi-

tion in which they had been shipped, and were so discharged into a bateau sent by the respondents alongside the vessel for the purpose of receiving the same, and that the said two chains were not lost while in the charge or custody of the appellant, but, on the contrary, the same were safely delivered to the respondents, and that if the same were lost overboard from the said bateau they were so lost after they had been safely delivered to the respondents, and while they were under their own care and responsibility.

The evidence established that shortly after the arrival of the steamship at Quebec, a bateau was sent alongside of her, at the instance of the respondents, to receive the three chains in question ; that for the purpose of delivery, the people on board of the steamship, attached the three chains together by tying the ends with rope ; that by this means, the chains were hoisted about forty feet at a time, out of the hold, and as soon as about forty feet were hoisted, they were slackened off into the bateau alongside, and then forty other feet of chain were hoisted out of the hold, and in this manner the delivery of the chains in question was proceeded with and continued until two of the chains, and about a third of the other or remaining one, had been delivered and put on board of the bateau, when a portion of this chain got down between the steamship and the bateau, and by its weight, began dragging away the other portions on board of both the steamship and the bateau ; the people on board of the steamship arrested the progress of the descent of the remaining portion of the chain from the steamship ; but all the chain which had been put on board of the bateau was carried out, and sunk in the river, and that upon endeavouring to raise the chains, the rope which attached them gave way, and the two chains in dispute remained at the bottom of the river. Four witnesses on board of the steamship stated that the chain was hoisted and delivered to the bateau men with all due care and caution ; and that at the time the two chains in question were carried away, they were delivering the chain in the same way that they

had done all along, and that the loss of the chain was the fault of the bateau men. The owner of the bateau, and another man employed on board of the bateau, said that the loss of the two chains in question was occasioned by the too great rapidity with which the people of the steamship delivered it ; that they could not receive it so fast as they delivered it, and that by their slacking it away too fast for them to receive it, the portion in question which carried away the two chains from on board of the bateau, got between the two vessels, and that they, the people of the bateau, could not prevent the loss of the two chains in question.

It was contended for the appellant, that from the circumstance of its having been proved by all the witnesses examined in the cause, that the two chains, for the non delivery of which the action had been brought, had been, in point of fact, safely delivered on board of the bateau of the respondents, and that it was only after they had been so delivered, that they were carried away and lost, that the action, therefore, which was in damages for the non delivery of the said two chains, could not lie ; and that if any right of action accrued to the respondents, under the circumstances, it was not the form of action which they had adopted.

That inasmuch as it had been clearly proved, as well by the witnesses of the respondents, as by those of the appellant, that the two chains in question had been delivered on board of the bateau, that the present action of the respondents could not be maintained.

For the respondents it was argued, that, upon examination of the evidence it would be found that the loss of the two chains in question was occasioned by the negligence and carelessness of the people on board of the steamship ; that though warned by the men in the bateau they continued to let the chain run down too fast, having it in their power to

control and check the motion of the chain ; in which respect the men in the bateau were completely powerless.

Sir L. H. LA FONTAINE, Bart C. J. :—In this case the Court here confirms the judgment of the Court below. The chains being attached together by the people on board the steamship were one whole, and until a delivery of the whole was made, there was no delivery at all, and therefore, they, the people of the steamship ought to have observed greater caution. It is moreover proved that the ropes with which they were attached were not strong enough, and therefore the people on board of the steamship ought to have taken more care, and greater precaution in slackening the chain into the bateau ; the judgment of the Court below is therefore confirmed.

POPE, THOS. for appellant.

HOLT and IRVINE, for respondent.

BANC DE LA REINE, } DISTRICT DE MONTREAL.  
EN APPEL.

Présents :—Sir L. H. LaFontaine, Bart. Juge-en-Chef,  
AYLWIN, DUVAL et CARON, Juges.

LALOUETTE dit LEBEAU, *et al*, ..... *Appellants.*  
et

DELISLE *et al*, ..... *Intimés.*

Jugé :—Que dans un contrat entre plusieurs individus pour l'exploitation d'une traverse, avec liberté à chacun d'eux de vendre ou céder ses droits, il n'est pas loisible aux cessionnaires d'une des parties d'agir de manière à nuire à l'entreprise ; que les autres sociétaires avaient une action personnelle et directe contre ces cessionnaires, tant pour les dommages résultant de leur infraction au contrat primitif, que pour faire rescinder le contrat pour l'avenir.

Held :—That in a contract between several persons for the keeping of a ferry, with power to any one of them to sell or convey his right therein, the assignees of any one of the said parties cannot act so as to injure the business ; that the other copartners have a personal and direct action against such assignees as well for the damages arising from their breach of the original contract, as for the rescission of the contract for the future.

Jugement rendu le 4 Mars, 1858.

Par un acte du 12 mars 1840, devant notaires, Michel Corbeil, Jean Rocan dit Bastien, Césaire Germain, Marie Angélique Dusablé et Pascal Lalouette dit Lebeau, un des

appelants, aux fins de faire cesser la compétition de trois traverses qu'ils avaient établies séparément et diminuer les dépenses, s'unirent ensemble pour ne former qu'une seule traverse, qui serait dirigée, conduite et entretenue, d'un côté de la rivière par Michel Corbeil et Lalouette, et de l'autre par Rocan, Germain et Marie Angélique Dusablé, Corbeil fournissant de son côté un chemin sur sa terre pour arriver à la traverse, et de l'autre l'usage qu'il avait acquis d'un chemin et lieu de débarquement, et pour lequel il devait continuer à payer seul la rente. Germain et M. A. Dusablé s'obligeant de fournir de plus, du même côté, un chemin sur leur terrain afin d'éviter l'escarpement de celui dont Corbeil avait l'usage. Les parties de chaque part devant fournir leurs voitures et traversiers nécessaires, et garder le profit qu'elles retireraient, sans en rendre compte aux associés de l'autre côté.

La traverse fut ainsi exploitée jusqu'en novembre 1847, que Michel Corbeil mourut, laissant pour héritier Désiré Corbeil, son fils, un des appelants, qui lui succéda dans la traverse ; puis en 1849, Jean Rocan étant décédé, ses héritiers vendirent leurs droits à Germain et à M. A. Dusablé.

Sur ces entrefaites un pont ayant été construit à quelque distance de la traverse en question, mais à charge de respecter cette traverse, les intimés firent l'acquisition du pont, et peu de temps après, achetèrent les droits de Germain et de M. A. Dusablé dans la traverse en question, dont le maintien nuirait à la prospérité qu'on espérait en faveur du pont. Ainsi maîtres de la traverse d'un côté de la rivière, ils élevèrent les taux, négligèrent le service des voyageurs qui fréquentaient cette traverse, éloignèrent le traversier de l'endroit du débarquement, de manière à détourner les passagers de ce lieu, et les acheminer vers le pont.

Cependant les appelants voyant la vogue de leur traverse iminuer, ainsi que leurs profits, et les intimés jouissant et occupant des terrains et chemins fournis par les appelants,

ces derniers intentèrent une action en résolution du contrat du 12 mars, 1840, et en répétition de dommages qu'ils disaient avoir soufferts par les manœuvres des intimés.

Les intimés répondirent à cette demande en alléguant qu'il n'y avait pas société entre les parties d'un côté de la rive et celles de l'autre ; que les appelants ne pouvaient avoir, et n'avaient, aucune action pour faire résilier l'acte du 12 mars, 1840, et ne pouvaient agir contre les intimés avec lesquels ils n'avaient jamais fait de société ou de conventions.

Les faits énoncés plus haut furent prouvés, néanmoins la Cour Supérieure accueillit la prétention des intimés et débouta l'action.

C'est contre cette décision que les appelants se pourvurent et avec succès. La Cour d'appel leur donna gain de cause par le jugement qui suit :—

La Cour, &c.—1. Considérant que les défendeurs (intimés) sont, au moyen de l'acquisition qu'ils ont faite de Césaire Germain et sa mère, aux lieu et place de ces derniers, et du nommé Jean Rocan dit Bastien, lesquels, par l'acte du 12 mars 1840, avaient contracté avec le dit Paschal Lalouette dit Lebeau, un des appelants, et feu Michel Corbeil père du dit Désiré Corbeil, l'autre appelant, celui-ci étant à ce regard, aux lieu et place de son dit père ;

2. Considérant que, d'après une juste appréciation de la preuve, il est évident que les dits défendeurs (intimés) ont manqué à leur engagements et à leurs obligations, au préjudice des demandeurs (appelants), tandis qu'ils conservent contre ces derniers tous les avantages et droits résultant en leur faveur du susdit acte du 12 mars, 1840 ; que, dans ces circonstances, les demandeurs (appelants) sont bien fondés à demander la résiliation du susdit acte, et à obtenir la réparation du dommage qui leur a été ainsi causé ; que, par conséquent, dans le jugement dont est appel, et qui dé-

boute les dits demandeurs de leur action, il y a mal jugé :— Infirme le susdit jugement... et ce avec dépens contre les intimés sur le présent appel ; et cette Cour,... condamne les défendeurs, (intimés) solidairement, à payer aux demandeurs (appelants), pour les causes d'action, la somme de £25. par forme de dommages, avec intérêt à compter de ce jour, et de plus, adjuge et ordonne que le dit acte, du 12 mars, 1840, soit, et il est par les présentes, rescindé et résilié à toutes fins quelconques, et les parties remises au même et semblable état qu'elles eussent été, si le susdit acte n'eût pas été passé, le dit Désiré Corbeil étant en conséquence réintégré dans la propriété des terrains et routes cédés par le dit feu Michel Corbeil pour l'objet que les parties avaient en vue, lors de la passation du susdit acte, et les défendeurs (intimés) déclarés déchus de tous droits de possession et d'usage des dits terrains et routes à l'avenir, et condamne les dits défendeurs (intimés) aux dépens de l'action.

LORANGER, POMINVILLE et LORANGER, pour les appelants.

CHERRIER, DORION et DORION, pour les intimés.

# SUPERIOR COURT.—QUEBEC.

Before :—MEREDITH, Justice.

No. 1495. { WARREN... ..... *Plaintiff.*  
                  { vs.  
                  { NOAD..... ..... *Defendant.*

Held :—That, in the case submitted, the defendant was liable in an action of damages, for having, in his capacity of agent or attorney of a third party, caused the illegal seizure of the plaintiff's property.

Jugé :—Que, dans l'espèce, le défendeur était responsable en dommages, pour avoir, en sa qualité d'agent ou procureur d'une tierce personne, fait illégalement saisir la propriété du demandeur.

Judgment rendered the 19th. December, 1857.

The action was in damages for the sum of £500, brought against the defendant for having, in his capacity



of agent or attorney of Messrs. B. Weir and Co., of Halifax, made affidavit upon which a writ of *saisie-arrest simple* issued, by virtue of which the sheriff seized, as of and belonging to one Alexander, a certain schooner called the "Joseph Howe," alleged in the declaration to have been, at the time of the seizure thereof, and for some time previously thereto, the property of and in the actual possession of the plaintiff, of which circumstance, it was further alleged in the declaration, the defendant had full and perfect knowledge at the time he so illegally caused the seizure of the schooner in question.

The defendant pleaded the general issue.

The plaintiff established that a few weeks previously to the seizure of the schooner in question he was in possession of her as owner, having purchased her from the said Alexander; that he had loaded her and sent her to sea, and that she was forced back to Quebec by stress of weather, when the plaintiff took out her cargo and placed it in his own store, and then sent the schooner to Jones' cove for safety during winter; that while there she was seized at the instance of the defendant, as aforesaid, although he was aware that the vessel had been previously sold to the plaintiff.

**MEREDITH, Justice :—**This is an action for the illegal attachment of property belonging to the plaintiff. The declaration alleges that in the month of November, 1855, the plaintiff was in the peaceable possession and enjoyment of a certain schooner called the "Joseph Howe."

That the defendant, acting as the agent of Messrs. B. Weir and Co., of Halifax, sued out a writ of *saisie-arrest simple*, by which the sheriff of this district was commanded to attach the estate, debts and effects of one Edwin Alexander, and that the defendant, by means of the said writ, caused the sheriff to seize the said schooner "Joseph Howe," which was then, the declaration alleges, not in

the possession of Edwin Alexander, but in the actual possession of the plaintiff.

The defendant has pleaded the general issue, and upon the issue thus raised, the plaintiff has proved that at the time of the seizure, and for some weeks previously, the schooner "Joseph Howe" was in the possession of the plaintiff as the owner of it; that he had loaded that vessel, and sent her to sea, and that when she was forced back, by stress of weather, he caused the cargo to be taken out and placed in his own store, and then for safety during the winter placed the vessel in Jones' cove.

According to the evidence, the defendant was fully aware that the schooner was in the possession of the plaintiff as the owner of it; but notwithstanding this, the defendant caused the sheriff to seize that vessel at Jones' cove, as being in the possession of Edwin Alexander who had absconded some weeks previously.

That the seizure thus made was illegal is beyond doubt. (1)

The writ empowered the sheriff to seize the estate, debts and effects of one Edwin Alexander, in *his possession*, and under colour of this writ, the sheriff seized a schooner then in the actual and exclusive possession of the plaintiff. It is true that the writ was sued out at the suit of B. Weir and Co., but that writ did not justify the making of the seizure of which the plaintiff complains, and as the defendant directed and caused the property of the plaintiff to be illegally attached, he is liable, as well as the sheriff, for the consequences of the illegal seizure so made.

Viewing the case, as I do, in this light, it only remains for me to consider the question of damages. On the one hand the defendant has caused an illegal use to be made of a writ issued from this Court, in consequence of which the plaintiff was deprived for about four months of the control

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(1) Pothier, Proc. Civ., part. 4, ch. 2, sec. 2, art. 431 :—Roger, Sa. Ar., p. 10.

of a vessel worth from £200 to £300: On the other hand, it appears that the plaintiff has suffered little, if any, pecuniary loss from the act of which he complains ; and the defendant, in participating in that act, seems to have been influenced solely by a desire to discharge his duty towards his principals, Messrs. B. Weir and Co.

Upon the whole then, I am of opinion that according to the strict principle of law, the plaintiff has a legal cause of action ; but when I bear in mind that the plaintiff purchased the schooner in question from a stranger here, who absconded shortly afterwards ; that the title of the plaintiff, as the owner of the vessel, was imperfect when the seizure was made ; that the defendant, throughout the transaction, acted in good faith as the agent of persons having a claim to the extent of £900 against the person from whom the schooner was purchased by the plaintiff : I am of opinion, that the damages ought not to be assessed at a greater sum than £5. Indeed, I have felt much doubt as to whether the sum to be allowed, should not be such as to bring the case within the statute limiting the costs in actions of damages ; but as the defendant has from first to last maintained the legality of the act complained of, I think the plaintiff ought to be allowed his reasonable costs in establishing the illegality of that pretension. The Judgment of the Court is therefore for £5 damages, with costs, as in an appealable action of the lowest class.

HOLT and IRVINE, for plaintiff.

STUART and VANNOVUS, for defendant.

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## COUR DE CIRCUIT.—QUEBEC.

Présent :—CHABOT, Juge.

No. 10. { GUAY *et al.*.....*Requérants*  
                   et  
                   { BLANCHET *et al.*.....*Intimés.*

Jugé :—1o. Qu'une élection municipale est nulle, parce que les votes ont été pris sur des feuilles volantes, et qu'il n'y avait véritablement pas de livre de poll énonçant l'objet de l'élection, les noms des candidats, ceux des électeurs, leurs domiciles et leurs qualités ; et parce que l'on avait voté sans nommer les personnes en faveur desquelles l'on votait, mais seulement en indiquant le parti que l'on voulait soutenir (1).

2o. Que les requérants, en pareils cas, qui demandent d'être déclarés dûment élus aux lieu et place des intimés, doivent alléguer et prouver qu'ils sont qualifiés et éligibles comme conseillers municipaux.

Held :—1o That a municipal election is void, because the votes were taken upon loose sheets, and that in fact there was no poll book stating the purpose of the election, giving the names of the candidates, those of the electors, their additions and places of residence ; and because the votes had been given without naming the candidates for whom such votes were so given, but merely by indicating the party in whose favor the votes were given.

2o. That petitioners, in like cases, who pray to be declared duly elected in the place and stead of the respondents, are bound to allege and prove that they are duly qualified and eligible as municipal councillors.

Jugement rendu le 26 mars, 1858.

Il s'agissait dans cette cause de la contestation d'une élection municipale qui avait eu lieu le 10 janvier, 1858, en la paroisse de Notre-Dame de la Victoire. La procédure avait lieu conformément à la 18 Vic., cap. 100, sec. 35 ; les questions soulevées dans cette contestation apparaissent suffisamment dans les observations du juge : les principales avaient rapport à l'irrégularité de l'enregistrement des votes et de la tenue du livre de poll.

CHABOT, Juge :—Le 11 janvier dernier une élection municipale devait avoir lieu en vertu de l'acte municipal de 1855, pour élire sept conseillers pour la paroisse de Notre-Dame de la Victoire, comté de Lévi.

La convocation et avis sont réguliers, au moins on ne se plaint point d'irrégularité à cet égard. Le Dr. Blanchet

(1) L'élection avait lieu en vertu des dispositions de l'acte des municipalités et des chemins du Bas-Canada, de 1855, 18 Vic., ch. 100.

avait été nommé par le préfet pour présider à cette assemblée, et a, de fait, présidé,—sa présidence n'est pas contestée. A l'heure indiquée, les électeurs assemblés ne sont pas unanimes, excepté quant à P. Couture, et un poll est demandé par trois électeurs et le poll est accordé, et les voix prises. D'après un arrangement antérieur, les voix se donnent pour l'un ou l'autre des deux partis, c'est-à-dire le parti des requérants et le parti des intimés, ou parti Guay et parti Blanchet, ou anciens ou nouveaux conseillers, sans mention expresse des candidats, excepté dans certains cas exceptionnels. Les voix sont prises pendant deux jours, et sont enregistrées par le président ou ses clercs, sur des feuilles volantes—une feuille pour chaque parti. Le second jour, à 5 heures, le président déclare les intimés dûment élus comme ayant la majorité des voix, et fait son rapport en conséquence au préfet.

Il est bon de remarquer, en passant, qu'aucune violence ou voies de fait n'ont été commises ; ce qui fait honneur aux électeurs de la localité, et qu'il est bon de signaler publiquement, d'autant plus qu'on a circulé dans le temps que des scènes disgracieuses avaient eu lieu.

Les requérants, Guay et autres, au nombre de six, allèguent qu'à cette élection ils ont été nommés candidats ; qu'un poll a été demandé, tel qu'il appert par des feuilles de papier fournies par le dit Dr. Blanchet, président, à Ed. Lagueux, préfet.

Qu'il appert de plus, par les dites feuilles, que Pierre Couture a été élu unanimement.

Que vu qu'il appert qu'il n'y avait que sept candidats, les requérants auraient dû être proclamés.

Dans les allégués ci-dessus, les requérants ne sont pas corrects en fait : il y avait plus de sept candidats, et un poll a été demandé ; ce fait est dûment prouvé, et les requérants l'allèguent eux-mêmes dans leur requête.

D'après la preuve, ce sont quelques-uns des requérants, ou au moins leurs partisans, qui ont demandé le poll.

Pour cette raison, les requérants n'avaient pas droit à être proclamés élus par le président, et cette Cour ne peut pas non plus les déclarer dûment élus. D'ailleurs, les requérants demandent à être déclarés élus : ils ne sont que six ; Couture est laissé de côté.

En supposant que la prétention des requérants serait fondée en fait, qu'ils étaient les seuls candidats, comment cette cour pourrait-elle déclarer dûment élues des personnes qui ne se disent pas dûment qualifiées et éligibles, et qui ne le prouvent pas davantage. La chose est impossible. Cette partie donc de la demande des requérants, qui demande que cette Cour les déclare dûment élus, est rejetée.

Les requérants n'ayant pas une foi sans bornes dans leur prétention d'être déclarés élus au lieu et place des intimés, invoquent d'autres moyens et prétendent l'élection des intimés nulle pour suite des irrégularités et des nullités suivantes :

10. Parce que le président n'a pas tenu de livre de poll ;
20. Parce qu'il a pris les noms sur des feuilles volantes ;
30. Parce qu'il n'appert pas sur ces feuilles qu'il y eut d'autres candidats que les requérants ;
40. Parce que les noms de baptême des électeurs ne sont pas donnés en entier ;
50. Parce que la résidence des électeurs n'est pas indiquée, et qu'il n'est pas dit s'ils sont propriétaires ou locataires ;
60. Parce qu'il n'appert pas, par ces feuilles, pour quels candidats les électeurs ont voté ;

70. Parce que vu cette manière d'enregistrer les voix, plusieurs électeurs ont refusé de voter ;

80. Parce qu'un grand nombre de voteurs n'avaient pas droit de voter ;

90. Parce que les dites feuilles ne fournissent pas les informations nécessaires ;

100. Parce qu'il n'y a pas de certificat au bas des dites feuilles.

Les requérants contestent l'élection en question en leur qualité de candidats seulement. La Cour a eu des doutes s'ils pouvaient, en cette qualité, attaquer de nullité l'élection en question. Quant à la première partie de leur demande, nul doute qu'ils devaient se dire, et se prouver qualifiés pour être déclarés élus, comme l'on vient de voir ; mais quant à attaquer l'élection des intimés purement et simplement, le statut leur donne ce droit. Le statut donne ce droit à tout candidat ou à 10 électeurs. Si les requérants ne sont pas qualifiés, toujours ils étaient candidats, et le statut leur donne le droit de contester ; au moins les intimés auraient dû nier expressément leur qualification, par un plaidoyer spécial ; ce qu'ils n'ont pas fait.

Maintenant voyons si l'élection des intimés est bonne, et si cette Cour peut la confirmer ou doit la rejeter.

Pas de livre de poll.—Sans entrer dans la définition que les dictionnaires peuvent donner, il est bien certain que la loi n'entend pas un livre relié d'une façon ou d'une autre ; mais elle entend et doit entendre, ce que le bon sens entend,—un livre ou papier quelconque qui contienne les choses nécessaires et qui fasse voir à sa face pour quelle fin il est destiné : il doit donc contenir :—

Que c'est un livre pour telle élection, parlementaire ou municipale, et pour telle circonscription ;

**Les noms des candidats ;**

**Les noms des électeurs ;**

**Pour quel candidat chaque électeur a voté ;**

En un mot, on doit trouver dans ce livre tout ce qui est nécessaire pour constater si les formalités de la loi ont été observées ou non.

Dans le cas présent, pas de livre de poll : des feuilles volantes seulement ;

Les noms de baptême des électeurs n'y sont pas entrés dans la plupart des cas ;

Il n'est pas dit si ces électeurs sont résidents dans la municipalité ou non ; s'ils sont propriétaires, locataires, etc. ;

Il n'est pas dit pour quel candidat les électeurs ont voté, excepté dans quelques cas isolés.

Par ces feuilles, il est donc impossible de se procurer les informations nécessaires, et par elles-mêmes elles ne prouvent rien.

La Cour ne peut donc considérer ces feuilles volantes comme des livres de poll, et en cela le président de l'assemblée ne s'est pas conformé à la loi, et en conséquence l'élection est illégale et doit être annulée. Dans le cas présent, la Cour aime à croire que le président de cette élection a agi de bonne foi ; qu'il n'est coupable ni de suppression, ni d'ajouté aux feuilles volantes ; mais un procédé semblable ne peut être sanctionné par la Cour. Les abus qui pourraient résulter d'une pareille conduite sont trop manifestes pour qu'il soit besoin de les signaler. L'officier public doit remplir son devoir conformément à la loi, et ne doit pas être surtout plus sage que la loi. Si la loi commande un mode de procéder, l'officier public doit s'y conformer, sans y en substituer un autre plus expéditif ou plus



économique, suivant sa manière de voir ; il n'a pas de discrétion à exercer.

Le jugement est comme suit :

La Cour, etc., considérant que les requérants n'allèguent pas, dans leur requête, qu'ils étaient dûment qualifiés à être élus conseillers de la dite municipalité, et qu'ils ne l'ont pas prouvé, renvoie cette partie de leur requête qui demande à ce qu'ils soient déclarés dûment élus.

Et considérant que le président à la dite élection n'a pas tenu un livre de poll, et n'a pas enregistré les voix des électeurs suivant la loi, et que ses procédés à la dite élection sont irréguliers :—déclare la dite élection faite comme susdit, le onze et le douze janvier dernier, et par laquelle les dits Joseph G. Blanchet et autres ont été déclarés élus conseillers municipaux pour la dite municipalité de la paroisse de Notre-Dame de la Victoire, comté de Lévi, nulle, et en conséquence la dite élection est par le présent annulée ; le tout avec dépens contre les dits Joseph G. Blanchet et autres.

Et la Cour ordonne que le présent jugement soit signifié à la diligence des requérants, au préfet du comté, aux dépens des dits Joseph G. Blanchet et autres.

GAUTHIER et RÉMILLARD, pour les requérants.

PLAMONDON et DECHÈNE, pour les intimés.

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## SUPERIOR COURT.—QUEBEC.

Before :—MEREDITH, MORIN and BADGLEY, Justices.

No. 2194. { ROUSSEAU..... *Plaintiff*.  
                   { vs.  
                   { HUGHES..... *Defendant*.

R, agreed verbally with H, at Nicolet, to tow his raft from Nicolet to Quebec, upon which H. telegraphed to his agent in Quebec to instruct R's agent in Quebec, to send up R's steamboat from Quebec to perform the towage in question, which was done, and the raft towed to Quebec accordingly :

Held :—That this did not constitute a cause of action arising within the district of Quebec so as to give the Superior Court there jurisdiction to try the case, under the 12 Vic, c. 38, s. 14 ; that the cause of action means the *whole* cause of action, or all the circumstances connected with the transaction giving rise to the action.

R, par convention verbale avec H, à Nicolet, s'engagea de remorquer un radeau de Nicolet à Québec, sur quoi H, par dépêche télégraphique, chargea son agent d'informer l'agent de R, à Québec, d'envoyer le vapeur de R, de Québec, afin de faire le service voulu, ce qui fut fait, et le radeau fut, en conséquence, amené à Québec :

Jugé :—Que cette convention ne donnait pas un droit d'action, originant dans le district de Québec, de manière à donner à la Cour Supérieure, dans ce district, juridiction dans l'instance, en vertu des dispositions de la 12e Vic, ch. 38, sec. 14 ; que la cause d'action voulue par le statut est la cause d'action en entier, ou toutes les circonstances qui se rattachent à la transaction et qui font surgir le droit d'action.

Judgment rendered the 7th. April, 1857.

This was an action for the towage of a raft of timber belonging to the defendant, from Nicolet, in the district of Three Rivers, to the city and district of Quebec, by the steamboat of the plaintiff, and for the detention of the steamer, at Nicolet, in and about the towage in question. The declaration further contained the usual money counts, including an allegation, that the defendant promised, in the city of Quebec, to pay the plaintiff for the towage in question.

Service of process was made upon the defendant in Three Rivers aforesaid, his place of residence.

The defendant pleaded by *exception déclinatoire*, that the Court here could not take cognisance of the action, because the towage in question was performed in virtue of an agreement entered into between the parties at Nicolet, in the district of Three Rivers, and that consequently the cause of

action must be considered as having arisen in the district of Three Rivers ; and that the plaintiff could not therefore implead the defendant in the district of Quebec, under the provisions of the Judicature Act of 1849, sec. 14.

The plaintiff replied generally.

The evidence established, that an agreement was entered into between the plaintiff and defendant at Nicolet, whereby the plaintiff undertook to tow the raft in question, from Nicolet to Quebec, for the price agreed on ; that the defendant subsequently telegraphed to his agent in Quebec, telling him to give instructions to the plaintiff's agent to send up the plaintiff's steamboat from Quebec to Nicolet to tow the raft in question, which was done, and the raft towed down accordingly ; it was further established, that after the arrival of the raft at Quebec, the defendant promised to pay the plaintiff for the towage thereof, if he would deduct a certain sum for the towage of some spars, which he had towed down at the same time as he had towed the defendant's raft.

For the *exception* it was contended, that inasmuch as the agreement in virtue of which the towage in question was performed, was entered into between the parties at Nicolet, in the district of Three Rivers, that the cause of action must be considered as having arisen there ; that the agreement in question was the cause of action, and the original circumstance out of which the action arose, and that the plaintiff could not therefore proceed with the present action.

Against the *exception* it was argued, that the original agreement between the parties had nothing whatever to do with the present action, inasmuch as it was brought, not upon that or any other agreement, but for work and labor—towage actually performed for the defendant, and upon his promise to pay therefore ; that the telegram of the defendant to his agent in Quebec, at whose express request the agent of the plaintiff in Quebec sent up the steamboat to

Nicolet for the performance of the towage in question, was the circumstance relied upon by the plaintiff, together with the actual performance of the towage of the raft, for the maintenance of the present action ; that if it were held that in order to constitute a cause of action it is necessary to shew that every circumstance connected with it occurred in one place, a dishonest debtor could easily avoid payment of his debts, by contracting a debt by means of correspondence addressed from different districts, and thereby prevent his liability to an action in any one district, except the one where he resided.

**MENEDITH, Justice :—**In this case the plaintiff has impleaded the defendant, not in the district in which the defendant has his domicile, but in the district in which the plaintiff himself resides. This proceeding being directly contrary to the general rule of law, "*actor sequitur forum rei*," in order to entitle the plaintiff to the benefit of the exceptional statutory provision upon which he relies, he must show that the *cause of action* in the present case, arose in this district ; and by the expression "*cause of action*," we have already held, the whole cause of action must be understood (1). In the present case, the agreement between the parties was entered into at Three Rivers, and the services in question were performed partly in the district of Three Rivers, and partly in the district of Quebec. It is therefore plain, that the *whole cause of action* did not arise in this district, and consequently we think the declinatory exception must be maintained. As to the argument founded on the supposed promise to pay on the part of the defendant, the evidence establishes, not a *promise* to pay, but a *conditional offer*. The claim was for £55, and the defendant offered to pay £25 for the towage of the raft, *provided a deduction* of £8 15, were made for the towage of a raft of spars, which the plaintiff's steamer towed down along with the raft. The witness who proves the offer, proves also a refusal to accept it ; and it is obvious that a conditional offer made by the defendant

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(1) *Warren vs. Kay*, 6, L. C. Repts., p. 492.

which the plaintiff refused to accept, cannot be made the basis of a judgment in favor of the plaintiff.

As to the necessity of showing that the *whole* cause of action arose in the district, I would refer to Borthwick *et al.*, appellants, and Walton *et al.*, respondents, 15. Common Bench Reports, p. 501. "A, carrying on business in Manchester, "by his traveller sold goods to B, at Oxford, which goods "were to be forwarded in the usual way, viz: by the "London and North Western Railway. The goods were "accordingly packed and sent by A, to the railway station "at Manchester, addressed to B, at Oxford:—Held, that, "as the order for the goods was received at Oxford, the "*whole cause of action* did not arise in Manchester, so as "to give the County Court there jurisdiction to try it under "the 9th. and 10th. Vict., cap. 95, s. 60.

"JERVIS, C. J.:—It has been decided over and over "again, that the "cause of action," in the 9th. and 10th. "Vict., c. 95, s. 60, means the *whole* cause of action. "I therefore think the County Court Judge in this cause, "was wrong in assuming jurisdiction. The whole cause of "action clearly did not arise in Manchester. The mere "delivery of the goods, at the railway station there, was "not enough; the plaintiffs were bound further to prove "the order: and that was given and received at Oxford. "The appeal, therefore, must be allowed."

In the same case, Judge Maule observed: "I also think "there should be a non-suit in this case, on the ground "stated by the Lord Chief Justice..... *Every* "*thing that is requisite to show the action to be maintainable* "is part of the cause of action. Cresswell, J., and Williams, "J., concurred." (1)

Declinatory exception maintained.

POPE, R., for plaintiff.

HEARN, M. A., for defendant.

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(1) 80 Engl. Com. L. Rep., p. 511:—(6. J. Scott):—And see the same case reported in 29 Eng. Law and Eq. Repts., 269.

## SUPERIOR COURT.—QUEBEC.

Before :—MEREDITH, Justice.

No. 1169. { STEVENSON *et al.*.....*Plaintiffs.*  
                   { vs.  
                   { BISSET.....*Defendant.*

Held:—That a joint action brought against the maker of a note, by two persons to whom the same is made payable by indorsement signed by the payee, to whom, or order, the note was originally made payable, is good on demurrer, though it is not alleged in the declaration that the plaintiffs are copartners, or have the right to sue jointly.

Jugé:—Qu'une action peut être portée contre le faiseur d'un billet, par deux individus auxquels il a été transporté par endossement par celui à l'ordre duquel il était payable d'abord, et une défense au fonds en droit à telle action n'est pas soutenable, quoiqu'il ne soit pas allégué dans la déclaration que les demandeurs soient associés ou aient le droit de poursuivre conjointement.

Judgment rendered the 7th. day of May, 1858.

This was an action instituted by James Stevenson and James Mitchell, to recover the amount of seven promissory notes, made by the defendant, in favor of Messrs. Robert Mitchell and Co., or order, who subsequently endorsed to the plaintiffs, in manner following :

“ Pay James Stevenson and James Mitchell.

(Signed) ROBERT MITCHELL & Co.”

The defendant demurred to the action.

LÉGARÉ, in support of the demurrer contended, that inasmuch as it was not alleged in the declaration that the plaintiffs were copartners, or had the right to sue jointly, the present action, being a joint action by the plaintiffs, could not be maintained ; that the promissory notes upon which the present action was brought, only gave a separate right of action to the plaintiffs for the amount due each respectively upon the notes in question ; that there was no contract or agreement alleged in the declaration shewing that the plaintiffs were entitled to maintain a joint action, and the action being for the recovery of a sum of money, the plaintiffs, not being copartners and having no power by contract to sue jointly, could not maintain the present action ; that the notes sued upon having been indorsed to two different

and distinct individuals, a joint action on those notes could not be maintained, but that each of the two persons in whose favor they were indorsed would have a separate right of action for the amount respectively due each on the notes in question. He further said he was aware that the English authorities on the subject were against him, but that the decision in this case would have to be founded on the principles of French law, and that the English authorities, therefore, would not apply, and he had no hesitation in saying that according to the principles of French law, a joint action in the present case could not be maintained, and referred to the case of Pouliot vs. Blanchette, Superior Court, No. 2371 of 1857, where it was decided, that where a sum of money was due to different persons, they must sue separately, and could not join in one action.

HOLT, *contra*, maintained that the plaintiffs could not bring a separate action, because but one party could be in possession of the note at a time, and any action against the defendant would have to be founded on the note,—so that while one would be suing, the other would be shut out from his right of action, and thus cause great inconvenience and delay; besides, the notes having been made payable to the two plaintiffs by order of the payee, the defendant being the maker of the notes, was liable to them in a joint action.

MEREDITH, Justice :—In the present case, the notes sued on are endorsed in favor of the plaintiffs jointly. They are presumed to have accepted them jointly, and as the joint holders of the notes, have a right to sue together in one action. Moreover, as justly observed by the counsel for the plaintiffs, they would be subjected to great and unreasonable inconvenience and delay, were they compelled to institute separate actions upon the same negotiable securities.

Demurrer dismissed.

HOLT and IRVINE, for plaintiffs.

LÉGARÉ and MALOUIN, for defendant.

## SUPERIOR COURT.—QUEBEC.

Before :—MEREDITH, Justice.

No. 982. { LAMPSON.....*Plaintiff*.  
                   { vs.  
                   { SMITH.....*Defendant*.

Held :—That the master of a ship is not personally liable for damage done by his ship to the plaintiff's property, whilst sailing out of the harbor of Quebec under the management of a branch pilot, taken on board in obedience to the provisions of the 12th. Vict., cap. 114, sec. 53.

Jugé :—Que le capitaine d'un vaisseau n'est pas personnellement responsable de dommage causé par son vaisseau à la propriété du demandeur, pendant que ce vaisseau faisait voile du havre de Québec, en charge d'un pilot branché pris à bord en obéissance aux dispositions de la 12me. Vict., ch. 114, sec. 53.

Judgment rendered the 19th April 1858.

MEREDITH, Justice :—The principal question to be determined in this cause, is whether the defendant, as master of the ship "Marion," is personally liable for injury alleged to have been done to the plaintiff's wharf by that ship, whilst sailing out of the harbour of Quebec under the management of a branch pilot, taken on board in obedience to the 53rd section of the 12 Victoria, cap. 114, which is as follows :

" And be it enacted that the masters of each vessel leaving the port of Quebec, for a port out of this province, shall take on board a branch pilot to conduct such vessel, under a penalty equal in amount to the pilotage of the vessel, etc., etc."

I give the words of this provision of law, at once, as the case turns upon it, and it is necessary to bear it in mind in considering the English cases to which I propose hereafter to refer.

The facts as established in evidence, are as follows : The plaintiff is the owner, under letters patent from the Crown, of a deep water lot opposite Diamond Harbour, and not far from a reef, or bank, shown upon Bayfield's charts, as



*"Banc à la Mouche."* On the front of this deep water lot, the plaintiff has built three blocks, the uppermost, or most westerly, of which is within the bed of the river, measuring from low water mark, to the extent of 432 feet. The passage for ships going to sea, from the wharves above Diamond Harbour, is between the uppermost of those blocks, and the lower end of the *Banc à la Mouche*.

Several branch pilots have been examined, and they prove that although the blocks in question are a great public convenience for the loading of ships, yet that they encroach upon the channel ; indeed, some say that the upper one is in the middle of the channel ; and they all agree in saying that the uppermost block makes the navigation of the river, at that place, more difficult than it formerly was.

The evidence further establishes, that the ship " Marion," of which the defendant was master, having loaded at a cove, higher up in the river than the plaintiff's blocks, and being ready for sea, was under the necessity of going through the passage in question on the evening of the 9th. of July last ; and that in doing so, and whilst under the charge of a regular branch pilot, that vessel struck against the uppermost of the plaintiff's blocks, and did it injury to the extent, as it is alleged, of £150 ; which the plaintiff seeks to recover by the present action.

The evidence, as I read it, establishes that the accident was in part attributable to the pilot having attempted to go through the passage in question when the tide was falling, and partly to the eddy caused by the block which was injured. As to the crew of the ship, and of the steamer that was towing the ship at the time of the accident, I am satisfied that there was no negligence or misconduct of any kind on their part.

Such being the facts of the case (assuming as I do for the purposes of the present discussion), that the plaintiff has a right of action, the question to be decided is : Can the master be

made personally liable for injury done by his vessel under the circumstances which I have mentioned.

No English case has been cited by the parties, nor have I been able to find any one, in which the precise question now raised has been determined ; but I do find that a very analogous case was formally adjudicated upon by the Supreme Court of the State of New York, whilst Chief Justice (afterwards Chancellor) Kent presided in that Court.

The case to which I allude is *Snell et al. vs. Rich*, (1) the marginal abstract of which is as follows : " A vessel ran foul of another vessel lying at anchor and carried away her bowsprit and did her other injury. The vessel that caused the injury was sailing out of the harbour, with a pilot on board, and the master was on shore at the time of the accident. In an action brought by the owners of the injured vessel against the master of the other vessel, it was held that the master was not liable for the damage." Chief Justice Kent, in rendering judgment in that case, observed : " As the master was not on board, he certainly was not master at the time of the accident. The pilot must be considered as master *pro hac vice*. The defendant therefore is not liable as master, and it does not appear that he was owner. But we give no opinion whether the owner would be liable."

Chief Justice Kent seems, in rendering the above judgment, to have attached weight to the fact that the master was on shore at the time of the accident ; and that circumstance was doubtless of some importance as showing conclusively that there was nothing in the conduct of the master tending to fasten responsibility upon him ; but it is thought that the master could not by going on shore have relieved himself from a liability to which he would have been subject, had he remained on board, without interfering in any way with the orders given by the pilot. And, ob-

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(1) 1 Johnston, p. 306.

viously, it would be very unwise to make it the interest of the master of a vessel to leave it, or go down into the cabin, as soon as a pilot goes on board ; for although, except in the most extraordinary circumstances, the master ought not to interfere with the pilot in his proper vocation, still for many purposes the presence of the master, on board his own ship, even after the pilot assumes the guidance of it, is not only useful, but necessary (1).

This seems to be the view that Judge Livingston, one of the Judges with Chief Justice Kent, in *Snell et al. vs. Rich*, took of the case, for he observed : “ It is universally understood that the pilot while on board, has the absolute and exclusive control of the ship, and *I am prepared to say that if the master had been on board, he would not have been responsible.*”

Chancellor Kent was not obliged to determine in that case, whether the master would have been responsible, had he been on board ; but it is satisfactory to find that twenty two years afterwards, when he wrote his justly esteemed Commentaries on American law, he laid down the rule as to the irresponsibility of the master, in a case such as the present, irrespective of the circumstance of his being on board, or not on board, at the time of the accident.

The passage to which I allude, is as follows : “ The pilot, while on board, has the exclusive control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel, while under the charge of the pilot, through his default, negligence or unskillfulness, the owner would be responsible to the party injured, for the act of the pilot, as being the act of his agent.”

“ Some doubt has been thrown on this point by the dictum

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(1) Haggard, 3 vol., p. 136 : —*Flanders, on Shipping*, No. 429 *et seq.*

" of Sir James Mansfield in *Boucher vs. Nordstrom* ; (1) *but the weight of authority and the better reason is, that the master, in such case, would not be responsible as master, though on board, provided the crew acted in regular obedience to the pilot (2).*"

Angell, in his law of carriers, lays down the law on this subject exactly in the same way. He says : " The owner of a vessel which through the fault or negligence of any one on board, injures another vessel, by running foul of her, is liable to the injured party, although there is a pilot on board who has the entire control and management of the vessel " . . . . . " For although the pilot holds his commission under government, yet in many respects he is the servant of the owner who employs him, and as regards the time of sailing is undoubtedly under the direction of the owner, *The master in such case would not be liable, for he is answerable only in respect of his authority over the vessel, which authority is entirely suspended by that of the pilot when the vessel is under sail, within pilot ground.*"

Flanders, in his *Treatise on Shipping*, published in 1853, seems to consider the law on this subject as well settled ; his words are : " If the master is bound by any law to take a pilot on board, he, as well as the owners, are exempt from liability arising from the neglect, default, or incompetence of the pilot (3).

The above authorities, which appear to me perfectly reasonable, suffice to show that as the vessel, at the time of

(1) *Boucher vs. Nordstrom* : 1 Taunton, 563.—*NOTE* : In this case, the defendant's ship was lying at anchor, and the act complained of was a wilful act of injury on the part of the crew under the direction of the pilot. The jury found a verdict for the plaintiff under the direction of Sir James Mansfield. But the Court held, that as it did not appear that the captain had done any act, the rule to enter a nonsuit must be made absolute.

(2) 3 Kent's Com. 135.

(3) Flanders, No. 425. It is to be observed that the four American cases cited by Flanders, do not, in so far as regards the owners, bear out the observation above quoted.

the accident, was sailing within pilotage ground, under charge of a pilot taken on board in obedience to the provision of the provincial Statute already referred to, and as the defendant did not by his conduct, in any way, contribute to that accident, he cannot be held liable for the consequences resulting from it.

As to the English cases cited at the argument, I have examined them attentively and believe I may assert that no one of them lays down any principle contrary to the judgment which I am about to render in this cause, and that the most recent decisions in the English Court of Admiralty go farther than is necessary for the maintenance of my judgment.

The first of the English judgments which I desire to refer to, was rendered in the well known case of Carruthers vs. Sydebottom (1). That action was an action of *assumpsit*, founded upon a policy of insurance, and it arose upon "The Alexander," a ship newly arrived in the port of Liverpool, to which an accident happened by the fault of the pilot *before she had been moored* in safety. The pilot had been taken on board under the provisions of the Liverpool Pilot Act, the 37th. Geo. III, chap. 38.

The Court of King's Bench (Lord Ellenborough presiding) held in this case, that if a master cannot navigate without a pilot, *except under a penalty, he is under compulsion of law to take a pilot*, and is not answerable for the misconduct or awkwardness of a person whose appointment is thus taken out of his hands (2). The words of Lord Ellenborough are : " Now to make the pilot the representative of " the master, and consequently to exempt the underwriter " from responsibility for his acts, it must first be shewn " that there is a privity between the pilot and the master, so " that the one may be considered the representative or agent

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(1) 4. M. and S., p. 77.

(2) Abbott on Shipping, Eng. Ed., p. 209 ; 6. Am. Ed., p. 279.

"of the other. But does the master appoint the pilot?  
 "Certainly not."—"The regulations of the general pilot  
 "Act impose a penalty upon the master of every ship which  
 "shall be piloted by any other person than a pilot duly  
 "licensed, within any limits for which pilots are lawfully  
 "appointed."....."But if the master cannot navigate  
 "without a pilot, except under a penalty, is he not under  
 "the compulsion of law to take a pilot? And if so, is it  
 "just that he should be answerable for the misconduct of a  
 "person whose appointment the provisions of the law have  
 "taken out of his hands, placing the ship in the hands and  
 "under the conduct of the pilot" (1).

This case was heard and decided in the Court of King's Bench, whilst the case of the Attorney General vs. Case (2) was under consideration in the Court of Exchequer. The judgments in these cases have generally been considered conflicting, and the learned counsel for the plaintiff, contended that the judgment in the cause of the Attorney General vs. Case makes strongly in favour of his client in the present cause. But upon a careful examination of the two cases, I think it will be found that although the observations of the judges may not perfectly agree, yet that the judgments are not in principle opposed to each other; and also that the case of Carruthers vs. Sydebottom is a strong authority in support of the position assumed by the defendant; whereas the plaintiff can derive no support from the Attorney General vs. Case.

The distinguishing feature of the Attorney General vs. Case, is, that the ship (the Columbus) which in that action was the cause of the injury, was at the time of the collision *riding at anchor*.

It is therefore perfectly plain that the owners were not, according either to the Liverpool Pilot Act, or to the gene-

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(1) 4. M. and S., p. 86.

(2) 3. Price, 320.

ral Pilot Act, under any *obligation* to have a pilot on board, and it follows that the pilot, on board the "Columbus" at the time, was, not only the agent of the owners, but was employed by them *of their own accord*, and therefore, assuming even that he was exclusively the cause of the collision, (which was not the case), the owners were, according to the plainest principles of law, liable for his acts.

Lord Tenderden, in the last edition of his work, refers to the cases of Carruthers vs. Sydebottom and the Attorney General vs. Case, in the following terms: "Two cases have been decided with respect to the Liverpool Pilot Act, not easily reconcilable with each other in all that was said by the learned Judges..... It may be inferred from the two cases, considered together, that when the master is bound by an Act of Parliament, *under a penalty*, to place his ship in the charge of a pilot and does so accordingly, the ship is not to be considered as under the management of the owners or their servants; but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as the servant of the owners" (1).

In the elaborate judgment rendered by Dr. Lushington in the case of "The Maria," (2) the cases of Carruthers vs. Sydebottom, and the Attorney General vs. Case, are carefully examined, and clearly explained, and the conclusion at which that learned Judge arrives, is stated by him as follows; "Then what is the result, upon my mind, of the two important cases to which I have so fully adverted, *leaving out of consideration* the question of the general operation of the Pilot Act, and its applicability to pilots appointed by the local authorities?" It is this: "I think both cases were rightly decided, the case of the Attorney General vs. Case, because there was no compulsion to

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(1) Abbott on Shipping, p. 208.

(2) 1. Rob., p. 96.

“ take a pilot : that of Carruthers vs. Sydebottom, because  
 “ the taking of a pilot was compulsory. Dr. Lushington  
 “ in the same case further observed (speaking of the case  
 “ of the Attorney General vs. Case), there is a confusion  
 “ in the report of that case which has raised much difficulty,  
 “ and the report cannot be reconciled with the decision that  
 “ was given upon that occasion. The ground upon which it  
 “ was decided was as I have already stated ; BUT IT NEVER  
 “ WAS DECIDED THAT A CLAUSE REQUIRING A PILOT TO BE  
 “ TAKEN ON BOARD, OR IF NOT TAKEN THE PILOTAGE TO BE  
 “ PAID, WAS NOT COMPULSORY (1).

I find also that the same cases have been referred to in the Supreme Court of the United States in the case of Smith vs. Coudry (2), in which Chief Justice Taney, in delivering the opinion of the Court, expressed himself as follows : “ In determining however the construction of these acts of Parliament, we are not left to decide between the conflicting opinions of the King’s Bench and Court of Exchequer. The same question has since, on more than one occasion, arisen in the British Court of Admiralty, and the decision in the King’s Bench (Carruthers vs. Sydebottom) has been constantly sustained ; and we presume is now the settled construction of these pilots Acts.” And reference is then made to Abbott, on Shipping, 184, n. z., and to the cases of “ The Maria,” “ The Protector,” and “ The Diana 1. W. Robinson, Admiralty Reports.

The case of “ The Maria,” (3) referred to by Chief Justice Taney, in which the observations of Dr. Lushington above quoted were made, is itself a strong authority in favour of the position taken by the defendant. In that case, “ the owners of a foreign vessel proceeding up the Tyne  
 “ with a duly licensed pilot on board, under the provisions

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(1) *The Maria*, 1. W. Rob., 101.

(2) 1. Howard, p. 84.

(3) 1. W. Rob., p. 96.



“ of the New Castle Pilot Act, were held not to be responsible for damage occasioned by the default of such pilot.” The 6th. section of the New Castle Pilot Act, applicable to that case, is as follows : “ That the owners, or masters of “ any foreign ships or vessels resorting to or coming into, “ or departing from, the said port of New Castle, or any “ of the creeks or members belonging thereto, shall and they “ are hereby obliged and required respectively to receive, “ take on board and employ in the piloting and conducting “ such their ships or vessels, such pilots, licensed as aforesaid, and in case of their neglect or refusal to receive and “ employ such pilots as aforesaid, they shall severally nevertheless answer and pay to the said master pilots and “ seamen the aforesaid pilotage duties.” The learned Judge of the High Court of Admiralty, in rendering his judgment in the case of “ The Maria,” after quoting the above section of the New Castle Pilot Act, continued as follows : (1) “ Now, does the section in question impose “ any compulsory duty and necessity upon the owner or “ master to take a pilot on board ? I am most clearly of “ opinion that the section referred to is compulsory. If it “ had been enacted simply that a pilot should be taken, “ without providing that, in case a pilot was not taken, the “ pilotage should be paid, the master would clearly have “ been liable to be indicted for a misdemeanor in refusing “ to take him, for every breach of an Act of Parliament “ within British jurisdiction, is an indictable offence, whether committed by a foreigner or not.

“ But assuming that all criminal proceedings are done “ away with by the clause enacting the pilotage to be paid, “ is it less compulsory upon the master to have such pilot “ on board ? It was so urged in the argument of counsel, “ upon the supposition that such argument had prevailed “ in the case of the Attorney General vs. Case ; but I have

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(1) 1. W. Rob., p. 109.

"shown that there is a mistake in the report of that case,  
 "and that the case itself is no authority for any such position. I have also further shown, *that in the case of Car-*  
 "*ruthers vs. Sydebottom, much weaker words were considered*  
 "*compulsory.* In the Liverpool Act, there are no such words  
 "as obliged and required, but simply, that if no pilot is  
 "taken, the pilotage shall be paid. But, independent of  
 "authorities, look at the words of the act themselves,  
 " "obliged," and "required," they are compulsory *per se.*  
 "But is not making the neglect to take a pilot, punishable  
 "with payment of the pilotage, also a compulsion upon the  
 "owners? Suppose the Statute had mentioned ten times  
 "the amount of the pilotage, where would be the difference?  
 "It would only be in the degree of the compulsion,  
 "but not in the compulsion itself. I have, therefore, no  
 "hesitation in saying, that this pilot so taken on board, in  
 "obedience to the Act of Parliament, was taken by compulsion,  
 "and if by compulsion, the owners are not responsible for his acts.

"The opinion I have thus formed in this case, is founded  
 "upon the general principles of reason and justice; that  
 "no one should be chargeable with the acts of another who  
 "is not an agent of his own election and choice; and  
 "I further think, that it would be contrary to all sense of  
 "equity, to say to the owners of a foreign vessel: "You  
 "shall take a pilot of our selection, of our appointment;  
 "be he drunk or sober, negligent or careful, skilful or ignorant,  
 "you shall be responsible for his conduct, unless you  
 "choose to submit to the penalty, and penalty it is, of  
 "paying the pilotage for nothing."

The same point came up fourteen years afterwards before the same learned Judge in the case of "The Montreal," (1) and in that case it was decided that both the vessels which had come into collision were to blame, but that with respect to one of them (the Montreal), the blame

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(1) 24. Eng. Law and Eq. Rep., p. 580.

was to be attributed to the pilot who had been taken on board under the Liverpool Pilot Act, the 5th. Geo. IV, c. 73, then in force, the 25th. section of which is as follows :  
 “ And be it further enacted, that in case the master or commander of any ship or vessel inward bound, shall refuse to take on board and employ a pilot, so to be licensed as aforesaid, who shall offer his services, such master or commander shall pay or cause to be paid to the pilot who first, or who only shall offer his services as aforesaid, and shall be so refused the pilotage according, etc., as if the said pilot had been received and employed in conducting or piloting such ship or vessel into the said port of Liverpool.”

It does not appear to me that this provision of law, or that the 6th. section of the New Castle Pilot Act above quoted, is more stringent than the 53rd. section of our own Statute which I have also already quoted.

Dr. Lushington, in this case (the case of “ The Montreal ”), held that the taking of the pilot on board under the provision of the Liverpool Pilot Act, just quoted, was compulsory, and therefore, that the owners of “ The Montreal ” were relieved from all responsibility ; the whole blame, in so far as regarded “ The Montreal,” being attributable to the pilot.

The last English case to which I shall refer as confirming this view, is the case of *Rodrigues vs. Melhuesh* (1), decided under the Liverpool Pilot Act by the Court of Exchequer in the year 1854. In that case, the point now under consideration was not formally adjudicated upon, as the Court held that the vessel which caused the mischief, was not proceeding to sea at the time the accident occurred ; but the observations of the Judges are of importance as shewing that they considered the law on this subject to be

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(1) 10. Hurleston and Gordon, 117.

as stated by Dr. Lushington in the different judgments already referred to.

Such are the leading authorities in support of the doctrine that where by law the master of a ship is obliged to take a pilot on board, under a penalty, the pilot so taken on board is to be deemed taken under compulsion, and that even the owners are not liable for the acts of a person not of their own selection.

On the other hand, Lord<sup>L</sup> Stowell, (1) in the year 1814, decided in the case of the "Neptune the Second," that the owners were responsible for damage occasioned "by the mismanagement of their ship, though it was under the care of a regular pilot under whose directions the master was acting." In referring to this case, Lord Tenderden observes (2): "The Act of Parliament (the 52nd. Geo. III, which had been passed nearly two years before) is not referred to in the case, and it seems clear that the learned Judge was not aware of it when his judgment was pronounced" (3). Still the case is of importance as showing, at least, what was, on this subject, the ancient law as it originally stood unaltered by any legislative enactment.

Sir John Nicholls afterwards in the case of the "Transit," (4) adopted and acted upon the judgment of Lord Stowell in the case of the "Neptune the Second" (5).

With these conflicting cases before us, although the more recent decisions, and I think I may say the weight of authority are in favour of the doctrine contended for by the defendant, it may, perhaps, be said that the law of England cannot be considered finally settled as to whether the

(1) 1. Dod's Adm. Rep. 467:—See 2. Hagg. p. 182.

(2) Abbott on Shipping, 208.

(3) See also 1. W. Rob. Ad. Rep., p. 49.

(4) 1. Month. Law Mag. 582 referred to in 1. W. Rob., p. 50.

(5) See also the *Girolamo*, 3. Hagg. 189.—In which Sir John Nicholls held that the 55th. sec. of the 6th. Geo. IV, a. 125, did not extend to proceedings in the High Court of Admiralty.

owners of a vessel are or are not liable for the acts of a pilot forced upon them by the provisions of a Statute ; but it is most important to observe that, whatever doubt may exist *as to the liability of the owners* under such circumstances, no case has been cited, nor have I been able to find one, in which *the master of a ship* has been held *personally responsible* for the act of a pilot, taken on board in obedience to an *express legislative enactment*.

And it will be recollected that Dr. Lushington, in the case of the "Maria," expressly asserts "that it never was decided that a clause requiring a pilot to be taken on board, or if not taken, the pilotage to be paid was not compulsory." And it is also important to observe that although the leading American authorities hold that the owners are liable under the circumstances supposed ; (1) yet they all concur in saying that the master is not liable under the same circumstances.

The reason of the distinction seems sufficiently obvious. The pilot whether taken on board at the option of the owners, or against their will, must be considered as their agent and in their employ ; and there is therefore some ground for rendering the owners liable for his acts, even when he is not an agent of their selection, but the pilot is not, and cannot be regarded as the agent of the master, or as being in his employ ; on the contrary, as has been already shown, the authority of the master, in so far as regards the guiding or conducting of the ship, "is entirely suspended by that of the pilot when the vessel is under sail (2) within pilot ground," and to make use of the words of Chancellor Kent : "The pilot while on board has the exclusive control of the ship, he is considered as master *pro hac vice* ; (3) there is therefore no reason for holding the master responsible for the acts of the pilot.

(1) Angell and Kent, as above cited :—And *Yates vs. Brown*, 8. Pick, 23 :—But see *Curtis on Merchant Seamen*, p. 196.

(2) Angell on Carriers, No. 664.

(3) Kent, Com., vol. 3, 135.

And here it may incidentally be observed that the responsibility of the master of a vessel, as the carrier of goods, is essentially different from the responsibility to which he is liable as respects accidents caused by his vessel; in the one case his responsibility to some extent is that of an insurer, whereas in the other he is answerable only for his own acts and for the acts of those who are, or who are presumed to be, under his control and direction.

After the foregoing tedious, but I think necessary examination of the authorities bearing upon this case, I return to the pleadings and facts upon which I have to adjudicate.

The plaintiff complains that "by and through the mere carelessness, unskilfulness and negligence of the defendant and of his servants and agents;" the said vessel, the "Marion," then "*under the command*" of the defendant, injured the wharf belonging to the plaintiff in the manner described in the declaration. The evidence as already explained shows that it being necessary for the defendant's ship, the "Marion," when proceeding to sea, to pass through the channel between the plaintiffs blocks and the *Banc à la Mouche*, that vessel was placed by the defendant under the charge of a branch pilot who was conducting and piloting the ship at the time the accident occurred, without any interference whatever on the part of the defendant. The conduct of the defendant, as master, was therefore exactly what it ought to have been, and had he pursued any other course he would have assumed a grave responsibility, and most improperly exposed the owners to serious risk. There are therefore no grounds whatever for saying that the defendant *personally* was guilty of any "carelessness, unskilfulness or negligence."

The blame (if any there be) attaching to the defendant's ship, devolves upon the pilot, and for the reasons already explained, he cannot be considered as the servant or agent of the defendant. As to the crew of the ship and steamer the evidence shows that no blame can be attached to them;

and even if there could, they were then in so far as regards the navigation of the ship, under the command of the pilot and not of the master.

For these reason then I am of opinion that the present action cannot be maintained.

It was my intention to have considered the questions raised by the learned counsel for the defendant, and so ably discussed on both sides, respecting the obstruction of the navigation of the River St. Lawrence by the plaintiff's blocks ; but, as after giving to the case much consideration, it seems to me that the reasons to which I have already adverted render it my duty to dismiss this action, and as I have already devoted to the case as much time as I have now at my command, I shall abstain from a discussion of the other important questions brought under my consideration at the argument.

I will merely add that in the course of the foregoing remarks, I have purposely abstained from adverting to the cases (1) decided under the sections of the general Pilot Acts (2), which expressly relieve the masters and owners of ships from all responsibility from the acts of pilots employed in pursuance of those Statutes, as there is no similar provision in our Statute on the same subject ; nor have I alluded to the 388th. section of the Merchant Shipping Act of 1854, headed, it is to be observed "*Saving of Owners and Masters' rights*," because the operation of that section seems to be confined to the United Kingdom. I cannot however avoid observing that that provision of law expressly sanctions the main principle upon which the present judgment rests.

Action dismissed with costs.

HOLT and IRVINE, for plaintiff.

PRIMROSE, for defendant.

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(1) See the *Protector*, 1. Wm. Rob., 46 :—*McIntosh vs. Slade*, 6. B. and C., 657 :—*The Diana*, 1. W. Rob., p. 132 :—*The Vernon*, do, 317 :—*The Massachusetts*, do, 371 :—*Bennet vs. Motta*, 7. Taunton, 258 :—*Ritchie vs. Bensfield*, 7. Taunton, 308 :—*Lucy vs. Ingram*, 6. M. and W., 303

(2) 52. Geo. III., c. 59 :—6. Geo. IV., c. 155.

## COUR SUPERIEURE.—QUÉBEC.

Présent :—MORIN, Juge.

No. 644.	{	ROMAIN.....	<i>Demanderesse.</i>
			vs.
		DUGAL.....	<i>Défendeur.</i>
			et
		JOBIN.....	<i>Opposante.</i>

La propriété immobilière saisie fut réclamée par l'opposante, comme propriétaire, en vertu du testament de son défunt mari, et la demanderesse plaida que subséquemment à la date du testament, le testateur et l'opposante, de lui dûment autorisée, avaient fait donation de la propriété saisie au défendeur; l'opposante répliqua spécialement que la donation avait été, subséquemment, et avant le décès de son mari, révoquée du consentement de toutes les parties à celle.

Jugé :—Que cette réponse spéciale ne pouvait être attaquée au moyen d'une défense aux fonds en droit, sur le principe que cette réponse invoquait un titre différent de celui allégué dans l'opposition; que, de fait, cette réponse n'invoquait pas cette révocation comme titre, mais que l'objet de cet allégué était de faire voir qu'en conséquence de la révocation en question, son titre, en vertu du testament, avait repris vigueur.

The immoveable property seized was claimed by the opposant, as proprietor, in virtue of the will of her deceased husband, the plaintiff pleaded that subsequently to the date of the will, the testator and the opposant, by him duly authorised, had made donation of the property seized to the defendant; the opposant replied specially, that the deed of donation was, subsequently, and before the death of her late husband, rescinded by consent of all parties thereto.

Held :—That such special answer was not demurrable on the ground that it invoked a different title from that alleged in the opposition; that, in fact, the opposant, by her special answer, did not invoke the revocation as a title to the property, but that the object of the allegation was to show that in consequence of the revocation in question, her title, under the will, had revived.

Jugement rendu le 9 décembre, 1857.

L'opposante, par son opposition afin d'annuler, réclamait l'immeuble saisi en la cause sur le défendeur, à titre de légataire universelle en vertu du testament de son défunt mari, en date du 10 avril 1832; et alléguait de plus qu'elle avait toujours possédé le dit immeuble, à titre de propriétaire, depuis le décès de son dit mari.

La demanderesse plaida à cette opposition par exception perpétuelle en droit, qu'après la date du dit testament, le dit testateur et la dite opposante, dûment autorisée, avaient fait donation du dit immeuble au défendeur en la cause, par acte devant notaires, en date du 2 de novembre 1844; et que depuis la date du dit acte de donation, le dit défendeur avait toujours possédé le dit immeuble comme proprié-



taire. L'opposante, par réponse spéciale à la dite exception, allégua que le dit acte de donation avait été résilié par acte de résiliation fait et passé devant notaires, le 5 de janvier 1846, par lequel dit acte de résiliation, le dit défendeur avait retrocédé et abandonné à la dite opposante et son dit défunt mari, alors vivant, l'immeuble en question.

La demanderesse, par défense en droit à la dite réponse spéciale de la dite opposante, allégua que les dites réponses n'étaient point fondées en droit, parce que par les allégués dans son opposition, elle prétendait être propriétaire du dit immeuble en vertu du dit testament, et par les dites réponses spéciales, elle se prétendait être propriétaire du dit immeuble en vertu de la résiliation de donation mentionnée dans les dites réponses ; et que par les règles de pratique, aucun moyen d'opposition ne pouvait être reçu outre ceux mentionnés dans l'opposition.

MORIN, Juge :—Je suis d'opinion que la défense en droit de la demanderesse aux réponses spéciales de l'opposante doit être renvoyée. L'opposante, dans ses réponses spéciales, n'allègue pas un titre différent de celui qu'elle invoque dans son opposition ; elle ne prétend pas, dans ses réponses spéciales, être propriétaire de l'immeuble dont il s'agit en vertu de la résiliation y mentionnée, mais la résiliation n'est alléguée que pour repousser les exceptions de la demanderesse en tant que fondées sur la donation du 2 novembre 1854, et l'allégué n'est autre chose qu'un simple énoncé, que la résiliation en question produit l'effet de la maintenir dans sa position comme légataire universelle, et propriétaire de l'immeuble réclamé par son opposition, en vertu du testament de son défunt mari.

GAUTHIER et RÉMILLARD, pour la demanderesse.

BELLEAU et JOLICŒUR, pour l'opposante.

## COUR SUPÉRIEURE.—QUÉBEC.

Présent :—MEREDITH, Juge.

No. 477. { NOEL, *ès-qualités*.....Demandeur.  
vs.  
CHABOT.....Défendeur.

Jugé :—Qu'un plaider à une action en dommages pour injures verbales, par lequel l'on répète et en même temps l'on offre de retracter les paroles injurieuses dont on se plaint, sera renvoyé sur défense au fonds en droit.

Question.—Savoir, si par le droit du Bas-Canada, la vérité des injures dont on se plaint, dans le cas même où il est allégué que les paroles injurieuses ont été prononcées par de bons motifs et pour un objet justifiable, peut être la base d'une exception à une action pour injures.

Held :—That a plea to an action of damages for slander, which repeats and at the same time offers to retract the slanderous words complained of, is bad on demurrer.

Query.—Whether, by the law of Lower Canada, the truth of the slander complained of, even where its publication by the defendant is alleged to have been from good motives and for a justifiable end, can be pleaded in bar to an action for slander.

Jugement rendu le 7 mai, 1858.

Par cette action, le demandeur, en qualité de tuteur *ad hoc* dûment élu à Chrysologue Noël, son fils mineur, réclamait du défendeur la somme de £25 de dommages, pour avoir dit et répété publiquement et malicieusement les paroles fausses et injurieuses mentionnées dans la déclaration, avec l'intention d'injurier et détruire la bonne réputation de son dit fils mineur.

Le défendeur plaida qu'en effet le fils du demandeur avait commis l'acte mentionné dans la déclaration, et que lui, le défendeur, le lui avait reproché dans l'intention de l'empêcher de commettre de tels actes à l'avenir ; qu'il n'avait nullement voulu ternir la réputation du dit Chrysologue Noël, et qu'il était prêt, pour acheter sa paix, à retracter toutes paroles injurieuses qu'il pouvait lui avoir dites à ce sujet, et demandait acte de cette offre de rétractation, et le renvoi de l'action.

A ce plaider, le demandeur fita une défense en droit.

LÉGARÉ, au soutien de la défense en droit, prétendait que les faits mentionnés dans le plaider du défendeur

n'étaient pas une défense à l'action ; que l'allégué, que, de fait, le fils du demandeur avait commis l'acte mentionné dans la déclaration, n'était pas une excuse, ou une justification qui pouvait, en loi, être offerte en mitigation d'injures, et n'était pas une défense à l'action, parce que si le fils du demandeur avait, de fait, commis l'acte mentionné, le défendeur n'avait pas le droit de le publier, et de l'exposer à tout chacun ; qu'il y avait un moyen légal, par lequel le défendeur aurait pu et pouvait encore procéder contre lui ; que le plaider du défendeur était contradictoire, en autant qu'il niait les faits et plaidait excuse, mitigation et justification ; que le défendeur ne pouvait, en loi, par son plaider, répéter les injures dont le demandeur se plaignait, et aussi offrir de les retracter ; que l'offre même de retracter n'était pas légale, en autant que n'étant qu'une réparation judiciaire, elle devait être faite avec offre des dépens, et que si le défendeur désirait faire réparation d'honneur, ou retracter les paroles injurieuses mentionnées dans la déclaration, il aurait dû admettre les faits et faire offre de se retracter, et déposer en cour les frais encourus par le demandeur jusqu'au moment de l'enfilure de son plaider, ou du moins offrir de les payer au demandeur.

LANGLOIS, *contra*, prétendait que l'allégué dans le plaider, que, de fait, le fils du demandeur avait commis l'acte en question n'était fait seulement que pour montrer que le défendeur n'avait pas agi malicieusement quand il se servit des paroles injurieuses mentionnées dans la déclaration, mais qu'il disait seulement la vérité, et pour démontrer qu'il avait le droit de plaider ce fait, il réfèrait à Starkie, on Slander.

MEREDITH, Justice :—There can be no doubt that, under the law of England, in an action of this kind a defendant may plead the truth of what he has said, and that such a plea would be good, irrespective of the motives by which

the defendant may have been actuated. But our law does not altogether agree with the law of England in this respect ; although probably even under our law a plea in an action such as the present, alleging that the defendant had spoken the truth with good motives and for a justifiable end, would be unobjectionable.

**LANGLOIS** :—Je maintiens que le défendeur peut le plaider pour montrer qu'il a dit ces mots pour le propre avantage du fils du demandeur, et sans aucune malice, et de plus, pour montrer qu'il ne s'est pas servi de ces expressions par malice, il offre de les retracter.

**MEREDITH** :—Vous voulez donc répéter les injures, et dans le même temps les retracter ?

**LANGLOIS** :—Oui ; mais l'offre de retracter est faite pour acheter la paix, et pour montrer que le défendeur n'avait point de malice contre le fils du demandeur ; et je prétends de plus qu'en droit le plaidoyer est bon, et doit être maintenu.

**MEREDITH, Juge** :—Je suis d'opinion que la défense en droit doit être maintenue, parce que le défendeur ne peut pas par son plaidoyer réitérer et aussi retracter les paroles injurieuses dont le demandeur se plaint.

Défense en droit maintenue.

**LÉGARÉ et MALOUIN** pour le demandeur.

**CASAVULT et LANGLOIS**, pour le défendeur.

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## SUPERIOR COURT.—QUEBEC.

Before :—MEREDITH, Justice.

No. 1505. { McDONALD *et al.* ..... *Plaintiffs.*  
                   { vs.  
                   { MILLER *et al.* ..... *Defendants.*

Held :—That when in a declaration in an action *pro socio* it is alleged that the plaintiffs have rendered an annual account of the portion of the partnership business under their control to the defendants, it is not necessary to offer and file with such declaration an account of the said portion of the partnership business; but it will be necessary to the maintenance of the action, to prove the allegation that an account has been rendered by the plaintiffs to the defendants.

Jugé :—Que quand il est allégué dans une action *pro socio* que les demandeurs ont annuellement rendu compte aux défendeurs de cette partie des affaires de la société qui était sous leur contrôle, il n'est pas nécessaire d'offrir et filer avec telle déclaration un compte de la dite partie des affaires de la société; mais pour pouvoir maintenir l'action, il sera nécessaire de prouver l'allégué, que tel compte a été rendu par les demandeurs aux défendeurs.

Judgment redereed the 19th. December, 1857.

This was an action brought by the plaintiffs to compel the defendants, formerly their copartners, to render an account of the portion of the partnership business under their control; concluding, in default thereof, for a condemnation for the sum of £25,000.

The defendants demurred, alleging that the plaintiffs were not entitled to their action, inasmuch as they had not offered by their declaration to render an account of the portion of the partnership business under their control, and had not filed any such account with their declaration; that the declaration was defective in this particular, and that consequently the action could not be maintained.

It was contended against the demurrer, that the declaration contained an allegation, that the plaintiffs had annually, during the existence of the partnership, rendered an account of the portion of the business under their management, to the defendants, and that these annual accounts had been received by the defendants; that it was not therefore necessary in the declaration to tender or offer an account of the portion of the business in question, nor to file any such account with the declaration, as the defendants had, according to the allegation in the declaration, been annually supplied with the same.

**MEREDITH, Justice** :—The plaintiffs having sued the defendants, who were formerly their copartners, for an account, the defendants have demurred to the declaration on the ground that although the plaintiffs demand a copartnership account of the portion of the business managed by the defendants—yet, that they do not offer an account of that part of the business managed by themselves.

But on reference to the declaration, I find there is an express allegation that the plaintiffs have rendered an account to the defendants, and that the defendants have accepted the account so rendered. Therefore, as to this essential allegation, there is a difference between this case and the case 1229, *Miller et al. vs. McDonald et al.*, cited by the learned counsel for the defendants.

If, as alleged, the plaintiffs have accounted, and that the defendants have accepted the account so rendered ; the defendants, in the account which they are now required to furnish, can credit themselves with the balance of the account rendered by the plaintiffs, if the balance was in their favor ; and they ought to debit themselves with the balance of that account, if it was against them ; so that in either case the whole of the copartnership accounts can be settled in the present case.

On the other hand, if the plaintiffs fail to prove that they have accounted, and that their account has been accepted, then according to the doctrine contended for by the present plaintiffs, and acted upon by the Court in *Miller et al. vs. McDonald et al.*, this action will have to be dismissed ; and this would seem reasonable, for the action claims a division of the whole of the copartnership assets, which would be impossible if we have an account of a part only of the copartnership affairs. But, for the present, the allegation must be assumed to be true, and therefore the demurrer cannot be maintained.

**STUART and VANNOVUS**, for plaintiffs.

**POPE, THOS.**, for defendants.

No. 1875. { BARBER et al.....*Plaintiffs.*  
vs.  
{ O'HARA.....*Defendant.*

**Held:—**That a writ of *Habeas Corpus* will not be granted in the case of a defendant confined in jail on civil process.

**Jugé:—**Qu'un writ d'*Habeas Corpus* ne sera pas accordé dans le cas d'un défendeur détenu pour cause civile.

SMITH, Justice :—This is a motion for a writ of *Habeas Corpus* for the release of the defendant from the common jail, in which he is confined under a writ of *Capias ad Respondendum*. The grounds of the motion are, that in the final judgment on the merits of the action, no allusion is made to the writ of *Capias*, nor is the writ declared good and valid, and that the writ had therefore lapsed. It is clear that this motion cannot be granted. The first *Habeas Corpus* Act in force, 24th. Geo. III, ch. 1, refers exclusively to criminal matters; the second, 52nd. Geo. III, ch. 8, sect. 6, expressly excepts from the operation of the Statute, parties confined on civil process. The words of the Statute are, “that nothing in this Act contained, shall extend to “discharge out of prison any person charged in debt, or “other action, or with process in any civil suit.” Whether the defendant therefore is or is not legally confined, the present motion cannot be granted.

**MONK and MACRAE, for plaintiff.**

**DEVLIN, for defendant.**

**BANC DE LA REINE, } DISTRICT DE MONTRÉAL.  
EN APPEL.**

**Présents :—Sir L. H. LaFontaine, Baronet, Juge en Chef,  
AYLWIN, DUVAL et CARON, Juges.**

**{ DUREAU.....Appelant.  
et  
{ DUREAU.....Intimé.**

**Jugé :—Que la procédure en Saisie Gagerie et expulsion sous l'acte 18 Vic., ch. 108, sec. 16, ne peut avoir lieu, à moins qu'il n'apparaisse d'un bail quelconque, ou de l'occupation avec consentement et permission de celui qui est réputé propriétaire.**

**Held :—That the proceedings for Saisie Gagerie and ejectment, under the act 18 Vic., cap 108, s. 16, cannot be maintained, unless founded on a lease, or on proof of the occupation by and with the consent and leave of the apparent proprietor.**

**Jugement rendu le 1er. Octobre, 1857.**

L'action en Cour Supérieure était portée par l'appelant contre l'intimé pour le recouvrement de £145 10s., savoir : £133 pour balance de sept années de loyer échues au 1er. mai 1855, d'une terre que le demandeur alléguait lui appartenir suivant donation que lui en avait fait son père le 13 mai 1840, (donation qui, cependant, n'a jamais été ni insinuée ni enregistrée), et qu'il avait permis verbalement à l'intimé d'occuper, en par ce dernier payant moitié des grains et produit de la dite terre, et pour laquelle occupation l'appelant disait qu'il méritait d'avoir la somme d'au moins £25 par an ; et de plus, une autre somme de £12 10s. pour valeur du loyer de la dite terre, pour occupation d'icelle sans bail, depuis le 1er. mai au 1er. novembre 1856, et demandant l'expulsion faite de paiement.

Le défendeur (intimé) opposa à cette demande une dénégation formelle des allégations contenues en la demande.

L'enquête faite de part et d'autre tendait à prouver l'occupation par chacune des parties comme propriétaire, et quelques déclarations vagues faites par le défendeur.

La Cour Supérieur, en déboutant son action, le motive comme suit : " Considering that the plaintiff hath failed to



" establish by evidence that the defendant held and possessed the farm and premises mentioned and described in the declaration in this cause under a lease either written or verbal from him the said plaintiff, or that the said defendant held the said farm and premises by and with the permission and consent of him the said plaintiff, as the proprietor thereof, and that, in consequence, the said plaintiff cannot maintain the present action, in the manner and form as he has brought the same, doth dismiss the said action &c., &c.

Ce jugement, porté en appel, a été confirmé en autant qu'il n'y avait pas mal jugé.

OUIMET, MORIN et MARCHAND pour l'appelant.

DAY et CRAMP pour l'intimé.

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COUR SUPÉRIEURE.—QUÉBEC.

Présent :—CHABOT, Juge.

No. 763. { FRADET,..... Demandeur.  
vs.  
LABRECQUE..... Défendeur.

Jugé :—Que dans une action en bornage le défendeur ne peut être condamné à contraindre ses voisins à borner avec lui, et un allégué et des conclusions à cet effet seront renvoyés sur défense au fonds en droit.

Held :—That in an action *en bornage* the defendant cannot be condemned to compel his neighbours to *borner* with him, and an allegation with conclusions to that effect will be held bad on demurrer.

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Jugement rendu le 31 mai, 1858.

*Action en bornage.* La déclaration contenait un allégué que le défendeur était propriétaire d'une terre située au sud ouest de celle du demandeur, et que le demandeur l'avait souvent requis de faire borner sa dite terre avec celles des propriétaires au sud ouest de lui le défendeur, qui n'étaient pas encore bornées, et qui néanmoins devaient l'être, vu que les concessions portaient du sud ouest et gagnaient vers

le nord est ; c'est-à-dire, que les terres au sud-ouest de celle du demandeur, et notamment celle du défendeur, étaient plus anciennes par la date de leur concession et émanaient du même auteur ou seigneur, et le demandeur concluait à une condamnation contre le défendeur pour lui faire prendre, vis-à-vis ses voisins au sud-ouest, les démarches et procédures nécessaires pour s'assurer dans les trois mois après les premières procédures prises d'un bornage légal et certain entre la dite terre et celle de ses voisins au sud-ouest, et de manière à vérifier l'étendue de toutes les terres depuis la ligne seigneuriale au sud-ouest, en gagnant le nord-est jusqu'à la terre du demandeur, et qu'à ces opérations le demandeur fut appelé en bonne et due forme, et que de plus il fut adjugé et ordonné, que par un arpenteur juré dont les parties conviendraient, sinon nommé d'office, il serait, en présence des parties, ou elles dûment appelées, procédés, à frais communs, au mesurage et bornage des terres des dites parties (demandeur et défendeur) suivant leurs titres et possession, tant en front qu'en profondeur, dont et du tout il serait dressé procès-verbal pour être homologué si faire se devait.

A cette action le défendeur fila une défense en droit.

CASAULT, au soutien de la défense en droit, maintint que le demandeur n'avait pas droit d'action contre le défendeur pour le forcer de faire borner ses voisins, et qu'en tout cas, il ne pouvait pas demander une condamnation contre lui à cet effet, sans lui offrir les frais nécessaires pour tenter les poursuites en bornage contre ses voisins, (1) et que la justice de ce principe de droit était évidente, vu que si le demandeur pouvait forcer le défendeur à poursuivre ses voisins, sans lui offrir les deniers nécessaires, ce serait exposer le défendeur, dans le cas où ces actions seraient non fondées, et que les défendeurs n'eussent pas les moyens de rembourser au défendeur les frais de ces actions qu'il aurait

(1) Nouveau Denisart, vbo., Bornage, page 658.

intentées dans l'intérêt et à l'instance du demandeur, à la perte des frais en question, il maintenait de plus que le demandeur n'ayant pas offert les frais nécessaires pour intenter ces actions contre les voisins du défendeur, que cette partie de sa déclaration, demandant une condamnation contre le défendeur pour forcer ses voisins de borner avec lui, était non fondée en droit et devait être rejetée. Que l'action en bornage ne pouvait s'exercer que contre un voisin immédiat, et qu'une partie ne pouvait pas forcer une autre de poursuivre ses voisins en bornage, et, qu'en conséquence, le défendeur n'ayant pas d'action pour les forcer à borner leur terres respectives, excepté contre son plus proche voisin au sud ouest, ne pouvait pas être condamné à contraindre tout les propriétaires au sud-ouest, jusqu'à la ligne seigneuriale, à borner, et l'action du demandeur, à cet effet, devait être renvoyée.

**TASCHEREAU, J. T.** pour le demandeur, soutenait que l'action était bien fondée contre le défendeur pour le contraindre à faire borner ses voisins avec lui ; que l'action en bornage ne pouvait être portée que contre le voisin en première instance et que ce voisin pouvait poursuivre son voisin, et ainsi jusqu'à ce que tous les voisins eussent borné, (1) et qu'en conséquence l'action du demandeur à cet effet était bien fondée.

**CHABOT, Juge.**—La Cour est d'opinion que la défense en droit doit être maintenue. Le défendeur ne peut pas être forcé de faire borner ses voisins ; il n'y a que les intéressés qui puissent intenter l'action en bornage, et le défendeur en cette cause n'a aucun intérêt à faire borner ses voisins. Selon a été cité, mais suivant moi il ne soutient point les prétentions du demandeur, la défense en droit est en conséquence maintenue.

**TASCHEREAU et DUVAL** pour le demandeur.

**CASAVULT et LANGLOIS** pour le défendeur,

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(1) Selon, *Servitudes*, page 82, no. 67.

## SUPERIOR COURT.—MONTREAL.

Before :—BADGLEY, Justice.

No. 1902. { SEAVER, *et al.*..... *Plaintiffs.*  
                   { vs.  
                   { NYE,..... *Defendant.*

**Held:**—That an action by the party indicated in a deed of sale as the person to whom the *prix de vente* of an immovable shall be paid, will be dismissed upon plea of compensation by the defendant, as holder of notes previously made by the vendor, the indication of payment not having been accepted by the plaintiff; and that the registration of the deed by the plaintiff does not affect the defendant's right in such a case.

**Jugé:**—Qu'une action par une personne indiquée dans un contrat de vente comme celle à laquelle le prix de vente d'un immeuble sera payé, sera renvoyée sur plaidoyer de compensation par le défendeur, en possession de billets promissaires faits par le vendeur, l'indication de paiement n'ayant pas été acceptée par le demandeur; et que l'enregistrement de l'acte de vente par le demandeur n'affecte pas les droits du défendeur en pareil cas.

Judgment rendered the 30th. April, 1857.

**BADGLEY, Justice.**—This action was brought in december 1857, to recover £100 being the purchase money of a lot of land sold to the defendant by William R. Seaver, by deed before notaries of the 31st. December 1856, the money being by the deed made payable to the plaintiff Elizabeth Seaver, four months after the date of such deed. The plaintiffs allege that she caused the deed to be registered, and that the delegation in the deed thereby became perfect.

The defendant pleads compensation and payment by two notes dated 4th and 6th December 1856, made by William R. Seaver, and transferred to the defendant in may 1857. The only question in the case is as to whether the indication of payment vested any absolute right in the plaintiffs, there being no acceptance of the indication made known to the defendant. I am of opinion that it does not, (1) nor can the registration affect the defendant.

**Judgment.**—The Court, &c., Considering that no legal acceptance appears of record by the said Elizabeth Seaver, or by the said plaintiffs, of the indication of payment to her made in and by the said deed of sale mentioned in the plaintiff's declaration, dated the 31st. December 1856, of the lot

(1) 7 *Toulhier* no. 236 :—2 *Grenier* no. 398, note, p. 236,

of land therein mentioned; and considering that the enregistration of the said deed of sale, was not the equivalent of such acceptance, and established no absolute claim in her favor upon the said price; and considering that the defendant became the creditor of the said William B. Seaver on the 22nd day of may last, for the sum of £110 for the causes in the pleadings by him in this cause filed, mentioned, whereby the price aforesaid due by him, the defendant, was more than compensated and extinguished, the Court doth dismiss the plaintiff's demand with costs.

DAY, for plaintiff.

FLEMING, for defendant.

BANC DE LA REINE, } DISTRICT DE MONTREAL.  
EN APPEL.

Présents :—Sir L. H. LaFontaine, Baronnet, Juge en Chef,  
AYLWIN, DUVAL et CARON, Juges.

LAROCQUE, ..... *Appelant.*  
et

MICHON, ..... *Intimé.*

Jugé :—Que le prêtre qui marie une mineure sans le consentement de ses parents, est passible de dommages en faveur des parents dont on a méconnu l'autorité; et que telle action procède valablement sans au préalable poursuivre la nullité du mariage.

Held :—That a priest who celebrates the marriage of a minor without the consent of her parents, is liable in damages to the parents whose authority has thus been disowned; and that such action is maintainable without, a previous suit to set aside the marriage.

Jugement rendu le 1er. mars, 1858.

L'action en Cour Supérieure était portée par l'Appelante, assistée de son second mari, pour dommages-intérêts contre l'intimé qui, en sa qualité de curé, ou exerçant les fonctions de curé, dans la paroisse de Roxton, y'avait célébré le mariage de la fille de l'appelante, alors mineure, sans publication de bans et sans avoir au préalable obtenu le consentement de la mère ou du tuteur de la mineure, qui tous deux étaient domiciliés en la paroisse de Rigaud; la demanderesse alléguait que l'époux était un homme inconnu, et que ce mariage n'était pas convenable.

Le curé pour défense à l'action plaida qu'il n'avait causé aucun dommage à la demanderesse, qu'il n'était point coupable en la manière et forme portée en la déclaration, et qu'en célébrant le mariage dont il s'agissait il n'avait fait que suivre les instructions de ses supérieurs ecclésiastiques, et que la demanderesse ne pouvait exercer la présente action contre lui.

Une admission des parties porte que " le défendeur a célébré le mariage du consentement, avec l'approbation et suivant les instructions de l'Evêque, qui avait donné dispenses des trois bancs." C'est là toute la preuve du défendeur. Quant à l'enquête de la demanderesse, elle roule sur le caractère du mari que presque tous les témoins ne connaissaient que depuis environ un mois, sur la clandestinité du mariage, et sur l'évaluation des dommages que peuvent souffrir des parents en pareille circonstance.

La Cour Supérieure par son jugement du 30 avril 1657, débouta l'action " faute de preuve ; " mais en rendant le jugement la Cour, par l'organe du juge Chabot, exprima l'opinion que la demanderesse en laissant subsister le mariage et n'en poursuivant pas l'annulation, le ratifiait tacitement et ne pouvait conséquemment réclamer des dommages de celui qui l'avait célébré, et qu'il n'existait aucun précédent dans lequel on eût condamné le curé ou prêtre à des dommages envers la partie, les condamnations prononcées portant seulement des peines corporelles contre le curé ou prêtre.

La demanderesse se pourvut en appel, se fondant sur les ordonnances qui prohibent le mariage des mineurs sans le consentement de leurs père, mère ou tuteurs, prétendant que de la violation de ces défenses, il résultait aux parents une injure qui était appréciable en argent. (1)

(1) Autorités citées par l'appelante :  
 Pothier, Mariage, nos. 66, 76, 321, 324, 325, 329 :—1 Bourjon, p. 7, nos. 7 et 8, p. 11, no. 30 :—2 Dareau, Injures, pp. 367, 388, 390, 422 :—8 Toullier p. 702, no. 503 :—2 Duranton no. 103, p. 87, no. 203 :—Lemerle, Fins de non recevoir, p. 186 :—Sedgwick, Measure of damages, pp. 24, 25, 28, 29, 34, 35, 38, 39, 490, 499 :—3 Chitty's Blackstone, p. 132 (163).

L'intimé soutenait de son côté qu'en France on n'aurait pu condamner un prêtre comme fauteur de rapt, sans procéder en même temps contre le ravisseur ; Que les prescriptions des ordonnances sur le mariage des mineurs étaient faites en vue de l'ordre public, et non en faveur des particuliers, et que les contraventions à ces ordonnances étaient seulement des offences contre l'ordre public.

La Cour d'Appel a accueilli les prétentions de l'appelante, en rendant jugement comme suit :

La Cour, etc. 1. Considérant que le défendeur (intimé), en célébrant, sans le consentement de l'appelante, le mariage de sa fille mineure, a violé les lois du pays et a fait à l'appelante, en méconnaissant l'autorité légale de celle-ci sur son enfant, une injure d'une gravité extrême, injure pour la réparation de laquelle, l'appelante est bien fondée à réclamer du défendeur (intimé) des dommages-intérêts ; 2. Considérant que l'appelante est recevable à demander la réparation de cette injure, sans être obligée au préalable d'adopter des procédés pour faire déclarer nul le mariage de sa fille mineure ainsi célébré sans son consentement et son autorité ; 3. Considérant par conséquent que l'action en dommage-intérêt, dirigée par l'appelante contre l'intimé, procédait valablement dans les circonstances établies par la preuve, et que dans le jugement dont est appel et qui déboute l'appelante de son action il y a mal jugé : Infirme le susdit jugement et condamne le défendeur (intimé) à payer à l'appelante pour les causes d'action la somme de £100 en forme de dommage-intérêts, avec intérêt et dépens.

**LAFLAMME, LAFLAMME et BARNARD** pour l'appelante.

**LORANGER et LORANGER** pour l'intimé.

## SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1060. { CHAPMAN,... ..... *Plaintiff.*  
                   { VS.  
                   { MASSON,... ..... *Defendant.*

**Held:**—In an action against a defendant as having been partner in a firm alleged to have been dissolved and insolvent, that the evidence of one partner is inadmissible to prove that the defendant was a member of the firm.

**Jugé:**— Dans une action contre un défendeur comme ayant été associé dans une société dissoute et insolvable, que le témoignage de l'un des associés pour prouver que le défendeur était un des membres de cette société est inadmissible.

Judgment rendered the 30th. of April, 1858.

SMITH, Justice.—This action is of great importance in point of principle, and involves a question as to the admissibility of evidence which I am not aware has been decided by our Courts. It is to be hoped the case will be carried further to have the point settled by the Court of appeals. It is an action brought against the defendant as having been a copartner in the firm of Ball and company, which is alleged to have been composed of William W. Snaith, William S. Ball, and of the defendant. The action is for a balance of account as due from May to 13th. October 1855, when the firm is alleged to have been insolvent.

The plea denies the partnership, and that the defendant had any thing to do with the purchase of the goods in question. The action turns on the proof of record. If the defendant was, as is pretended, a secret partner in the firm of Ball & Co. he is responsible to the plaintiff. The notarial articles of copartnership between Snaith and Ball are filed in the cause, and are dated the 21st. May 1855. The partnership was to last for one year and to be carried on under the firm of Ball & Company, Snaith having two thirds of the profits, and Ball the remaining third. The articles of copartnership were registered as required by law, and the main, indeed the only, point which the plaintiff had to establish was that



the defendant was a partner in the firm. Four witnesses were examined by him in support of his action and nine for the defence. One of the witnesses proves the delivery of the goods to the firm of Ball & Company. The three remaining witnesses are Snaith, one of the copartners, Thompson, and McNevin. Thompson speaks to a conversation had with the defendant in February or March 1855, in which he says Masson admitted that he was to furnish the stock to Snaith who was a clerk in his wholesale establishment, and that he, Masson, was to have a share in the profits, but was not to be known as a partner as it might interfere with his wholesale business. When cross examined he admits he does not know whether the partnership was actually carried out on the terms mentioned by Masson.

McNevin states that he fitted up the store at the defendant's request, and after consultation with him, he having gone to see him with Snaith; he never, however, presented the account to any one. The witness mainly relied on is Snaith whose evidence as to the proof of the partnership is objected to on the ground of interest. He says the defendant was a copartner in the firm, and here arises the important question referred to. Is he competent to prove this? After the best consideration I am of opinion he is not competent. His interest is to shift a responsibility from himself, and to render the defendant liable, and I have been unable to find any case where, in like circumstances, the testimony of an acknowledged partner was received to fasten a liability on another who denied the copartnership, and was not proved to have interfered in the management of the business; the cases of *Hall vs. Curzon* and *Blackitt vs. Weir*, were cited at the Bar as to copartners being called as witnesses to prove certain facts, but these are cases referring to joint stock companies, and not to a case like the present. The general rule is well settled, that declarations or admissions of a partner are not allowed against his copartners, without proof of the partnership *aliunde*; and I am of opinion that the weight of authority

is against the admission of Snaith's evidence in the circumstances disclosed in this case.

It would lead to the gravest consequences, if an insolvent merchant, who has registered his partnership with one man, could subject any other third party to a judgment by his own testimony that such third party was a secret partner. I hold therefore Snaith to be an incompetent witness, and the action must be dismissed.

**JUDGMENT** :—" Considering that the plaintiff hath failed "to establish by legal and sufficient evidence that the said "defendant was a copartner in the firm of Ball and Co., as "alleged in the declaration, by reason of which the said "defendant could be considered liable in law, as set up in "and by the said declaration ;—And further considering that "the evidence of William W. Snaith, a witness produced "on behalf of the said plaintiff, is inadmissible by reason "of the interest of the said witness, in obtaining a condemnation against the said defendant, as sought in and "by the said declaration, the Court doth reject the evidence "of the said Snaith, and doth dismiss the action of the "said plaintiff, with costs. "

**ABBOTT and BAKER**, for plaintiff.

**ROY and ROY**, for defendant.

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*NOTE*.—*Authorities referred to by Mr. Justice Smith, in giving Judgment* :—Greenleaf, Ev., No. 177 :—2 Bing., p. 133 :—1 Phillips, Ev., p. 344 :—Collyer, on Part., Nos. 450, 453 :—7 Bing., p. 395.

*Authorities cited by plaintiff's Counsel* :—Pothier, Sociétés, No. 81 :—1 Greenleaf, Ev., No. 279 :—6 B. and C., No. 385 :—Hall vs. Curzon, 9 B. and C., No. 646 :—Bulkley vs. Dayton, 14 Johnson, p. 367.

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No. 716. { BÉLANGER et ux.....*Plaintiffs.*  
              { vs.  
              { THE MAYOR, ALDERMEN AND CITIZENS OF THE  
              { CITY OF MONTREAL.....*Defendants.*

**Jugé :—**Que la Corporation de la cité de Montréal n'est pas responsable en dommages envers une personne qui a tombé dans la cave d'une maison brûlée, qui n'avait pas été reconstruite et dont l'emplacement, notwithstanding le Règlement de la Corporation à cet effet, n'était pas enclos; la cause de tels dommages étant trop éloignée.

**DAY, Justice**—This is an action of damages brought for injury sustained by the wife of Bélanger, one of plaintiffs, falling into the cellar of a house in one of the streets of this city, burned down in the great fire, the lot not having been enclosed by a fence. The ground taken by the plaintiffs is, that the Corporation having made a By-Law obliging all proprietors, under specified penalties, to fence in vacant lots within the city limits, is bound to enforce such By-Law, and are liable for any injury that may happen for want of fences. The defendants deny that they are liable for damages so occasioned, and in my opinion no such damages can be recovered. The cause of such damages is too remote. The direct responsibility falls upon the proprietor of the lot. He was bound to fence his lot, and if he did not do so, was liable to the penalty imposed by the By-Law. No doubt it was in the power of the defendants, and it was the duty of their officers, to enforce this By-Law as well as all other By-Laws, so far as practicable ; but it, by no means follows from their failure to do so that the defendants are liable for damages such as these, or that the owner of the lot may not be held responsible for them. It would be extending the responsibility of the defendants too far to hold them liable in such a case. The pavement or side

walk is shewn to have been in perfect order, and it appears that the wife of the plaintiff Bélanger, was returning from market, with a basket on her arm, in open day, when, from some cause not explained, she found herself at the bottom of the cellar, and sustained the damages complained of.

**JUDGMENT :—**" Considering that the defendants are not " by reason of the allegations in the plaintiffs' declaration " contained, and of the proof of record in this cause; and " by law, liable to pay to them, the plaintiffs, the damages " by them sought to be recovered in and by their said declaration and action,—doth dismiss the said action, with " costs. "

**LEBLANC and CASSIDY, for plaintiffs.**

**PELLETIER, for defendants.**

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### SUPERIOR COURT.—QUEBEC.

Before :—CHABOT, Justice.

No. 69.	{	RUSSELL .....	vs.	Plaintiff.
		PARKE .....		Defendants.

**Held :—**1o. That a pilot in charge of a vessel is entitled to remuneration from the owner, in addition to the usual pilotage, for loss of time, and for services rendered in saving some of the spars and rigging of such vessel, carried away owing to the defective quality of the materials used.

2o. That where the owner of such vessel obtains indirectly the amount of such pilot's claim from the underwriters, the pilot will recover from the owner in an action for " work and labor, and loss of time, " although there be no count in the declaration for money had and received.

**Jugé :—**1o. Qu'un pilote en charge d'un vaisseau a droit d'être rémunéré, outre le pilotage ordinaire, pour perte de temps et pour services rendus en sauvant des espars et une partie du gréement du vaisseau, emportés en conséquence de la mauvaise qualité des matériaux employés.

2o. Que lorsque le propriétaire de tel vaisseau obtient indirectement des assureurs le montant de la réclamation du pilote, le pilote a droit de recouvrer tel montant dans une action pour " ouvrage et perte de temps, " quoique la déclaration ne contienne aucun chef pour argent reçu.

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Judgment rendered the 8th. day of March, 1858.

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This action was brought to recover the sum of £30, for services performed in saving the spars, rigging and sails of

the defendant's vessel, and for the value of the plaintiff's time in the detention occasioned him, by reason of the vessel having had her spars and rigging aforesaid, damaged and carried into the sea, the said spars and masts being then and there unsound;—Plea, that admitting the services of the plaintiff, as laid in the declaration, he could not by law maintain any action therefor, because he was at the time the pilot in charge of the vessel, and was piloting her down the river St. Lawrence, and had the command of her as such pilot; and that by his own negligence, imprudence and want of proper skill and precaution, he had caused the damage for the repairs of which he brought the present action. The evidence established that a few days after the departure of the vessel from Quebec, and while opposite "Malbaie," a squall overtook her by which some of her spars were carried away; that the plaintiff was in charge of her as pilot at the time, and that the vessel was detained there until new spars had been sent from Quebec, when the plaintiff and the others on board put up the new spars and refitted the rigging, etc.; the evidence was conflicting as to the quality of the spars which had been carried away, the plaintiff's witnesses alleging that they were good, new and sound, the defendant's, that they were of rotten or dead wood. It was further proved that after the return of the plaintiff to Quebec, he presented an account to the defendant for £30, for the services performed and for the value of his time in and about the occurrence in question, that the defendant advised him to allow his claim to be included in that of the owner of the steamboat that conveyed the new spars to the vessel, so that he, the defendant, might cause the amount to be paid by the underwriters, as he feared that they might object to pay his, the pilot's claim, but that if it were included in the account of the owner of the steamboat, they would not in all probability object to it; that this was accordingly done, and the account of the owner of the steamboat was raised from £60 to £90; that this account was presented by the defen-

dant to the underwriters, together with another account for £30 for the pilot's claim ; that the underwriters paid the account of £90 to the defendant, but rejected the account for £30, which was a separate and additional account for the plaintiff's claim which the defendant had presented to the underwriters for payment.

POPE, THOS., for plaintiff:—At the defendant's request, the plaintiff piloted the ship "Gladiator," of which the defendant was owner, from Quebec, on her outward voyage. When off Malbaie and within pilotage limits, some of the upper spars were carried away, there being but a moderate breeze at the time. It was then discovered that the foretop mast had been made out of what is called "dead wood." It was defective and rotten. It snapped and carried away the other spars and sails with it. The defendant had not provided extra spars to meet any emergency of this kind. The steamer "John Bull" was sent for to Quebec, and she brought down the spars required. In consequence of the occurrence, the plaintiff was detained several days, during which time he could have piloted two other vessels which had been promised him and for which services he would have got over £30 ; and which he lost owing to this detention. It has been attempted to be proved that the foretop mast was good ; but the testimony cannot be regarded favorably, owing to the interest which the witnesses have in the matter, and the vagueness of their statements ; besides the spar itself afforded the best evidence on that point, it was examined when it fell to the deck, and found to be bad. On the plaintiff's return to Quebec, he presented his account for the detention and services rendered in saving the spars and rigging, amounting to £30, to the defendant. The agent of the steamer presented *his* account at the same time, amounting to £60. The defendant then said, that he would pay both accounts, but added that there might be some difficulty in his obtaining payment of the plaintiff's account from the underwriters in England, but that none

could arise respecting that of the steamer ; and to secure repayment, he requested that both accounts should be merged into a single account, made out for £90, in the name of the steamer, as if the latter sum were that really charged for her services, in taking down the spars, etc. This was done, the defendant adding that he would pay the plaintiff his £30 in a few days. The latter waited nearly a year, and being unable to obtain payment, has been compelled to take legal proceedings. The defendant (although he has not pleaded it) appears desirous of shewing that he was only to pay the plaintiff when he himself should have been paid by the underwriters ; but he has failed to shew that there was any understanding on that subject. A very curious circumstance was revealed during the cross-examination of the defendant's witness and nephew, William Parke. He states that being in England, the defendant sent him, some time after the accident, the account against the underwriters for the damage occasioned to the " Gladiators " by the loss of the spars, etc., which he was to submit to an average stated, in order to obtain payment. Among the items was the very account for £90 already mentioned, purporting to be the same charged by the steamer " John Bull " (and which, of course, included the £30 due the plaintiff) ; and another account for £30 alleged to be due the plaintiff for his services : thus making two charges of £30 each for those very services. According to the witness, the average stated approved of the account for £90, and rejected that for the £30. Comment on this proceeding is unnecessary. It is established that the defendant admitted before this action was brought, that he had received the amount of the account from the insurers. Under these circumstances it is submitted, that inasmuch as the detention of the plaintiff was occasioned by the defective quality of the defendant's spars ; that owing to such detention he was prevented from earning £30 ; that his services in saving the spars and the time he was employed about the same are worth that sum ; that the defendant promised to pay him

that amount ; and that, finally, the defendant has actually received the sum for which the plaintiff now sues, the plaintiff is entitled to recover the amount demanded.

PARKIN, for defendant, contended that upon reference to the evidence adduced in the cause, and particularly to that of William Parke, a witness produced on behalf of the defendant, it would be found that the loss of the spars was occasioned by the want of care and negligence of the plaintiff in crowding on too much sail, much more than the best and soundest spars were able to carry in the weather that then prevailed ; that under any circumstances the plaintiff could not recover in the present action, for no principle of law was better established than that a person engaged in any capacity on board of a vessel, could not claim for salvage, except under very extraordinary circumstances (1); that the plaintiff, being the pilot employed on board of the vessel at the time of the accident in question, could not therefore claim any compensation for his services in saving the vessel ; that this principle was further recognised and expressly enacted by the Provincial Statute, 12 Vic., Chap. 114, Sec. 42, as follows :—

“ And be it enacted, That any Pilot saving or endeavouring to save a vessel in distress shall be entitled to  
 “ a remuneration to be fixed by the Trinity House of Quebec,  
 “ if such Pilot shall not have agreed with the Master or  
 “ owner of the vessel as to the compensation for such service,  
 “ provided he be not the Pilot on board and in charge  
 “ of such vessel ; ” and that the action could not therefore be maintained. That with respect to the transaction connected with the Insurance Company, or underwriters, it would be perfectly understood by Couture’s evidence, that the defendant merely undertook to pay the plaintiff, provided he could obtain the amount from the underwriters, but that this was a *nudum pactum* and could not be allowed to militate

(1) Haggart, p. 287, case of the “ Neptune ” :—2 Abbott, on Shipping, p. 560 :—2 Haggart’s R., p. 3.



against the defendant ; that even supposing it were proved that the defendant had received the amount from the underwriters, the plaintiff, notwithstanding, could not succeed in his action because the declaration contained no count for money had and received ; and further because, if any one had a right to recover it, it could only be the underwriters, who, through misrepresentation, had paid the money in question to the defendant.

POPE, in reply. The defendant admits his strongest authority is the statute referred to, and yet it cannot apply, because, 1o. the plaintiff did agree with the owner respecting the amount of such compensation, and 2o. the plaintiff was the pilot in charge. The section does not prohibit a claim on behalf of the pilot. A consideration sufficient to sustain the action has been established and there is the undertaking to pay. No count for money had and received was inserted in the declaration because it was only during the *enquête* that the plaintiff learnt that the defendant had been paid by the underwriters. The plaintiff can recover on the allegation that the defendant acknowledged to owe and promised to pay.

CHABOT, Justice.—There can be no doubt that the defendant received the amount of the plaintiff's claim from the underwriters, and this being the case, the court is not of opinion, as it was pretended by the defendant, that the only persons entitled to recover from him, are the underwriters. It would probably have been better for the defendant if he had never allowed the action to be brought.

Judgment for plaintiff.

POPE THOS., for plaintiff.

ANDERSON and PARKIN, for defendant.

**EN APPEL.**

**AYLWIN, DUVAL et CARON, Juges.**

et

**Held:—**That immovable property held by the lessee after the expiration of an emphyteotic lease, may be legally seized as belonging to the lessor to whom it must revert.

**Jugement rendu le 12me. Décembre, 1857.**

L'intimé, demandeur en Cour inférieure, ayant obtenu jugement contre le curateur à la succession vacante de feu Messire Louis Lelièvre, pour une somme de £50, avait fait saisir, comme appartenant à la succession, un immeuble que l'appelant détenait, quoique le bail emphytéotique en vertu duquel il avait possédé fut expiré depuis dix ans.

L'appelant demandait l'annulation de cette saisie alléguant qu'elle était faite *super non domino*.

L'intimé de son côté soutenait que la possession de l'appelant depuis l'expiration du bail était précaire, et ne lui donnait aucun droit sur l'immeuble saisi.

La Cour d'Appel a confirmé à l'unanimité le jugement de la Cour Supérieure qui avait donné gain de cause à l'intimé.

**GLEASON, pour l'appelant.**

**CASALT et LANGLOIS, pour l'intimé.**

## SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1694. { GORRIE..... *Plaintiff.*  
 VS.  
 THE MAYOR, ALDERMEN AND CITIZENS OF  
 MONTREAL..... *Defendants.*

Held :—1o. That assessors appointed under a Statute authorising the Corporation of Montreal to appoint such assessors, and to grant them such remuneration for their services, as the Council may deem fitting, cannot recover on a *quantum meruit* in an action against the Corporation.

2o. That the right of a witness is to be taxed in the Court in which he is examined, and not to bring an action in another Court, on a *quantum meruit* for attendances and loss of time as such witness.

Jugé :—Que des cotiseurs nommés en vertu d'un Statut autorisant la Corporation de la cité de Montréal de nommer tels cotiseurs, et de leur accorder telle rémunération pour leurs services que le Conseil jugera à propos, ne peuvent pas porter une action contre la Corporation pour un *quantum meruit* pour tels services.

2o. Que le droit d'un témoin est de se faire taxer par la Cour devant laquelle il est examiné, et non de porter une action devant une autre Cour, pour un *quantum meruit* pour comparutions et perte de temps comme témoin.

Judgment rendered the 27th. February, 1858.

The declaration in this cause set up that on the 6th. June, 1853, the plaintiff was appointed one of the assessors for the city of Montreal, and accepted the office, as he was bound to do under a penalty of £50, and that he performed all the duties of his office under the law in force at the time, “and that for his reasonable wages or remuneration for performing the said duties as aforesaid, the plaintiff became entitled to ask and have from the defendants £150 currency, which sum the defendants were and are bound to pay and have often promised to allow and pay to the plaintiff, yet have not paid.”

Then follow similar allegations as to his appointment and as having acted as assessor for the year 1854, and of his having, under the 16th. Vict., c. 152, made an alphabetical list of persons appearing from the assessment rolls to be qualified to vote for members of the Legislative Assembly, alleging in the same terms that for his wages or remuneration he was entitled to £300, the two sums forming £450, of which only £250 were paid. Conclusion for £200.

1st. Plea. That under the 34th. section of the 14th. and 15th. Vict., c. 128 (1), five assessors were named by the Council for the civic year 1853, one of whom was the plaintiff, who performed his duty as such assessor, and that under the same section, the Council fixed the remuneration of the five assessors at £500; of which sum the plaintiff received his proportion, £100. That under the same section, three assessors were named for the year 1854, and £225 allowed to each, of which sum the plaintiff was paid £150, and that the defendants were always ready to pay the balance £75. That moreover the plaintiff did not make the alphabetical list referred to, but that it was made by the officers of the Corporation, and that no additional or other remuneration was provided for by the Act last referred to.

Conclusion: "Pourquoi les dits défendeurs, persistant dans leur offre de payer la dite somme de soixante-et-quinze livres, cours actuel, pour les raisons expliquées ci-dessus, concluent au débouté de la dite action du demandeur, avec dépens."

2nd. Plea. *Défense en fait.*

Answer to first plea: "That the allegations therein contained, save in so far as they admit the plaintiff's demand, are insufficient in fact and in law."

That a committee appointed by the defendants themselves received and reported upon a petition of the plaintiff to be paid the sum demanded by the action, but the defendants refused to be bound by the said report. Conclusion for £200.

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(1) Sect. 34: "And be it enacted, that at any quarterly, or special meeting of the said Council after the election of members thereof, in the year of Our Lord one thousand eight hundred and fifty two, and in each succeeding year, the said Council shall appoint as many assessors for the said city, not exceeding nine in number, as may be necessary, and the said Council may grant the said assessors such remuneration for their services as they, the said Council, may deem fitting, and the said Council may order and determine in what and how many wards the said assessors shall act, and if they see fit, that the assessors to be appointed shall act as such, throughout the whole city limits; and it shall be the duty of the said assessors to make the assessments, etc."

The counsel for the plaintiff, at the argument contended :

1st. That the plaintiff at common law had a right to be paid by the Corporation what his services were worth (1).

2nd. That no innovation of the Common Law is to be presumed beyond what is expressed (2).

3rd. That the 34th. clause in the 14th. and 15th. Vict., does not touch the plaintiff's rights, or impose any obligation on him, but simply gives a faculty to the Corporation.

SMITH, Justice :—The action is for a *quantum meruit*, which, under the circumstances of this case, cannot be maintained, even if in any case it could be maintained against a Corporation by one of its officers. The law gives the defendants a right to fix the remuneration for the duty performed by the assessors. This was done, and the plaintiff must be supposed to be aware of this fact, as well as of the extent of his duties. The defendants admit the balance of £75, which is all the plaintiff is entitled to claim, but if the action does not exist, I can take no notice of such tender, it amounts to nothing. If the Corporation had refused to fix the rate of remuneration, there would be more reason for such an action, but, even in that case, the plaintiff's rights would have been exercised by *Mandamus* to oblige the defendants to perform their duty. There is another action of *Boulanget*, another assessor, which is the same as this, except that he claims £25 for attendance as witness before the Recorder, when the assessment list was contested. This I cannot allow. His right was to be taxed, which was not done.

JUDGMENT :—" Considering that the said plaintiff hath  
" failed to establish, by law, any right of action to recover  
" the sum claimed by him from the said defendants, by  
" reason of any thing alleged in his said declaration, and

(1) Angel and Ames on Corporations, 3 Ed., p. 309, sect. 12.

(2) Dwarria on Statutes, p. 696.

**PELLETIER, J. F., for defendants.**

**Before :—MONDELET, Justice.**

No. 1653. { ROBERTSON *et al* ..... *Plaintiffs*.  
vs.  
Ferguson ..... *Defendant*.

40. That service of the declaration may be made at the sheriff's office, under the 7th. Geo. IV. cap. 8.

40. Que service de la déclaration peut être fait au bureau du shérif, en vertu de la 7<sup>me</sup>. Geo. IV, chap. 8.

**Judgment rendered the 22nd. February, 1858.**

The plaintiffs, in their declaration, alleged the sale and delivery to the defendant, on the 20th. August, 1857, of 22 boxes of tea, on a credit of three months, that the defendant thereupon gave his note at three months for the amount of the purchase, which, on the day it became due, and the term of credit expired (23rd. November, 1857,) was protested for non payment ; also that the defendant had become insolvent, and that the 22 boxes of tea so sold, or

a large number of them, still remained unbroken and in the same condition as when sold, and that the plaintiffs had tendered back the note to the defendant, who accepted it before action brought.

The conclusions of the declaration were as follows :

“ Wherefore the said plaintiffs bring suit, and pray that  
 “ upon the affidavit herewith made and filed, a writ of  
 “ seizure or attachment under and by virtue of the 177th.  
 “ article of the *Coutume de Paris*, may issue to attach the  
 “ twenty two boxes of tea, or so many of them as may be  
 “ found in the possession of the said defendant, to the end  
 “ that the same may be kept and preserved to await the  
 “ future order and judgment of this Honorable Court re-  
 “ specting the same ; and that, for the causes aforesaid, the  
 “ said sale and delivery of the said tea may be declared  
 “ rescinded, and that the said attachment may be declared  
 “ good and valid, and the said defendant adjudged and  
 “ condemned to deliver and restore to the said plaintiffs, as  
 “ aforesaid, the said twenty two boxes of tea, or so many  
 “ of them as may be found in his possession, on the service  
 “ of the said process of attachment upon him, and that in  
 “ the event if the whole of the said twenty two boxes of  
 “ tea not being found in the possession of the said defen-  
 “ dant, on the service upon him of the said process of  
 “ attachment, the said defendant may be condemned to pay  
 “ to the said plaintiffs, as aforesaid, the prices assigned in  
 “ the said account to the said boxes of tea as shall not be  
 “ so found in the possession of the said defendant, with  
 “ interest, the whole with costs to the undersigned. ”

The affidavit was made on the 24th. November, 1857, and a writ of *Saisie-Revendication* issued with the affidavit indorsed, commanding the sheriff to seize “ twenty two boxes tea, or so much thereof as may remain in the possession of G. B. F., the defendant,” omitting however the usual words “ *belonging to the said plaintiffs.* ” The

return of the sheriff states that he " attached and seized in " the possession of the defendant, as belonging to the plaintiffs, six boxes of the tea mentioned in the writ, being " all that remained thereof. "

A motion to quash the writ was made on the ground of informalities in the affidavit and in the writ, more particularly set forth in the *exception à la forme*.

This motion was rejected by Smith, Justice, on the ground, principally, that the matters relied on at the argument could not properly be brought up on motion.

The defendant filed an *exception à la forme*, containing in effect the following grounds :

1. That the affidavit was informal and not such as was necessary to obtain a writ of attachment before judgment, and that the writ, process and seizure were informal.

2. That by the law of Lower Canada, no such writ could legally be issued under the circumstances disclosed in the affidavit.

3. That it was not stated in the affidavit that the teas were the property of the plaintiffs, or that they had any such rights therein as could entitle them to sue out a writ of attachment.

4. That it was not stated in the writ to whom the teas belonged, nor did the nature of the writ sufficiently appear from the wording of it.

5. That there was no sufficient description of the property in the affidavit and writ, nor did it appear from the affidavit that the goods were unbroken and *en totalité*.

6. That no grounds were stated for the alleged *déconfiture* ; and that even if the facts set forth in the affidavit were admitted, they disclosed no legal ground of seizure.

**MACRAE and CARTER**, for defendant, urged, among other objections :



1st. That the affidavit upon which the writ issued was informal.

2nd. That the writ was defective.

3rd. That the 177th. article *Coutume de Paris* did not give the vendor of goods sold and delivered on credit, the right to revendicate.

4th. That the privilege given by this article of the Custom was lost to the vendor, if the goods sold were not *en totalité* (in an entirety) at the time of seizure.

5th. That the acceptance by the vendors of the defendant's promissory notes in payment, created a novation, and thus deprived them of any privilege under the Custom of Paris.

6th. That the service of the declaration at the sheriff's office, was not a valid service upon the defendant.

POPHAM, for the plaintiffs, argued :

I. That the privilege mentioned in the 176th. and 177th. articles *Coutume de Paris* were not new privileges thereby introduced, but simply the application of a privilege which had always existed in the Law of France (having its origin in the *Commissory Pact* of the Roman Law) in cases where, otherwise, it might be supposed such privilege would not apply (1).

II. That, under the 177th. article of the Custom, the vendor had the choice of three modes of proceeding :

1st. If the goods sold on credit were under seizure, at the suit of another creditor of the vendee, he (the vendor) could, by opposition, claim to be paid out of the proceeds of the sale of the goods, in preference to all others.

2nd. That when the goods remained in the undisturbed possession of the purchaser, the vendor could issue an attachment to seize them, ask that they should be sold, and

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(1) Pothier, *Vente*, Nos. 461, 476.

that the proceeds of the sale be paid to him by special privilege.

3rd. And he had, in addition, a third privilege which, although it might not have been acted upon in our Courts, existed in our Law, namely, the right, when the goods remained in the undisturbed possession of the purchaser, who had become insolvent, to demand them back, and that the purchaser be condemned to pay for such of them as might not be found in his possession at the time of the seizure (1). That the right to revendicate real estate for non payment of the price, in cases where the vendor's hypothecary privilege had been lost by neglect of registration, had been maintained in appeal, in *Patenaude vs. Lerigé dit Laplante* (2).

III. That by reference to the statute 7th. Geo. IV, cap. 8th., it would be seen, that the service of the declaration at the sheriff's office was, in these cases, a sufficient service upon the defendant.

**MONDELET, Justice :—**This case is of importance to the commercial community. It comes before the Court upon an issue raised by an *Exception à la forme*, and has been taken under the 177th. article of the *Coutume de Paris*, and demands re-possession of merchandize which has been sold and delivered upon a term of credit, in consequence of the insolvency of the purchaser. The affidavit, writ and declaration have been attacked by the defendant with *Exceptions à la forme*.

The first question to be answered, is : Is an affidavit necessary to obtain the writ in such cases? I hold that it is not. These articles of the Custom are in full force, and are not affected either by the Ordinance of 1667, or by the Ordinance of 1785, which required affidavits for the writs issued under their provisions. I cannot find that in France

(1) 2 Brodeau, Comm. sur l'art. 177 Cout. de Paris, p. 435 :—2 Ferrière, Dict. de Droit, vbo. Revend. de Marchandises :—1 Bourjon, Droit Commun de la France, p. 423, chap. 9, sect. 1 :—7 Toullier, No. 539.

(2) 7 L. C Rep., p. 66 :—See also Troplong, Priv. et Hyp., No. 161.

any affidavit was required, and therefore, I hold an affidavit to be unnecessary. As it is unnecessary, it will be useless to notice any of the objections which have been raised as to the sufficiency of those made in this case.

The second question for consideration is, whether the present action has been properly instituted under the 177th. article of the Custom?

I think it has.

This article applies to several cases : 1o. To the case where the goods sold are seized by another creditor, when the vendor, by an opposition, can claim payment by special privilege from the proceeds of the sale ; 2o. To the case where the goods sold remain in the undisturbed possession of the debtor, when the vendor can seize the merchandize, and demand that it be sold, and the proceeds paid to him by privilege.

I hold, and consider my opinion maintained by the law as it stood in France and by the jurisprudence of the country, that the article likewise applies to a *third* case, where a purchaser *à terme* has, in the *interim*, become insolvent, the vendor can retake possession of the goods sold.

The service of the declaration, at the sheriff's office, was a sufficient service on the defendant.

Exceptions dismissed.

JUDGMENT :—" Considering that in and by his *Exception à la forme* in this cause filed, the defendant hath neither alleged nor shown that the plaintiffs have omitted any essential formality in and previous to, and to the end of the issuing of the process in this cause complained of by the defendant. Considering that by the laws of Lower Canada, the process which has been issued in this cause under the 177th. article of the *Coutume de Paris* is not, in all respects, subject to all and every the formalities

" required in connection with other seizures and attachments, and namely, that an affidavit such as prescribed in other cases is not *de rigueur* in a proceeding and on a process such as the present. Considering that the present process is, and may be, classed among those which, by the laws of Lower Canada, are issuable against, and for attaching the estate, debts and effects of what nature soever, whether in the hands of the owner, the debtor, or of a third person, and inasmuch as in such case or cases, by a statute in force in Lower Canada (7th. Geo. IV, ch. 8), service of the declaration specifying the cause of action upon which such writ or writs shall have respectively issued may be made upon the defendant, either personally, or by being left at the office of the sheriff of the Court into which such writ shall have been made returnable, at any time within three days next after the service of such writ, if the same have issued in term, or within eight days next after such service, if the writ have issued in vacation ; and whereas the service of the writ or process in this cause hath been made according to law, as well as of the declaration, and is in all respects good, valid and sufficient. Considering further, that the process or writ in this cause issued cannot, and ought not, to be assailed, or called in question, as to its validity, nor the issuing, nor the execution thereof, by any reason or cause alleged in the said *Exception à la forme*, the Court doth dismiss the said *Exception à la forme*, with costs."

POPHAM, for plaintiffs.

MONK and MACRAE, for defendants.

E. CARTER, counsel for defendants.

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NOTE.—In causes No. 1643, *Sinclair vs. Ferguson*, and No. 1654, *Mills et al. vs. Ferguson*, in which the same attorneys were engaged, and the same points raised, similar judgments were rendered by Mr. Justice Mondelet, on the 22nd. February, 1858. The cases cited in a note to *Torrance vs. Thomas*, (2 Jurist, 100), were referred to by Mr. Popham, as being cases where a privilege upon the price only was demanded, and the case of *Renshaw vs. Tilton*, in the Superior Court, Montreal, in which he acted for plaintiff, was mentioned as the only case he had been able to find, where the privilege of Revendication as claimed in these actions, had been prayed for. This last case went *ex parte*.

BANC DE LA REINE, } DISTRICT DE QUÉBEC.  
 EN APPEL.

Présents :—Sir L. H. LaFontaine, Baronnet, Juge-en-Chef,  
 ALWIN, DUVAL et CARON, Juges.

{ RENAUD..... *Appelant.*  
 et  
 { GUGY..... *Intimé.*

Jugé :—1o. Que la récusation, aux termes de l'ordonnance de 1667, titre 24, art. 23, ne peut être faite que par écrit.

2o. Que l'inimitié capitale mentionnée au 8e art. du même titre, pour pouvoir donner lieu à la récusation, doit être une inimitié de la part du juge, et ainsi alléguée et prouvée, sans quoi les moyens de récusations seront déclarés n'être pas pertinents.

3o. Que les causes de l'inimitié capitale alléguées comme provenant du chef du juge, doivent être particulièrement déclarées.

4o. Que l'inimitié capitale qui donne lieu à la récusation, est une inimitié décidée, connue, manifestée, occasionnée par l'homicide de quelque proche de la partie faisant la récusation, par des querelles, des affaires d'honneur ou d'un gros intérêt, dont le ressentiment porterait à saisir les occasions d'attenter à la vie, à l'honneur ou aux avantages temporels de son ennemi.

Held :—1o. That the recusation contemplated by the ordinance of 1667, tit. 24, art. 23, can only be made in writing.

2o. That the hatred (*inimitié capitale*) mentioned in the 8th art. of the same title, to give rise to a recusation, must be hatred on the part of the judge, and must be so alleged and proved, failing which the reasons of recusation will be held impertinent.

3o. That the causes of such hatred so alleged as existing on the part of the judge, must be specifically declared.

4o. That the hatred which gives rise to a recusation, must be a decided hatred, known, manifest, the result of the killing of some near relative of the person urging such recusation, or the result of differences, personal encounters, or matters of large interest between such person and the judge, which could create a feeling of revenge which might lead to using the opportunity of destroying the life, the honor or the personal advantages of ones enemy.

Jugement rendu le      Juin, 1858.

Dans le cours de l'instance l'Honorable T. C. Aylwin, l'un des juges de la cour, fut récusé par l'intimé dans la cause. La récusation fut faite au moyen d'une requête où il était allégué :—

“ Qu'entre l'honorable T. C. Aylwin, un des juges de cette cour, et l'intimé, il y a inimitié capitale, et au désir de l'ordonnance, le dit intimé offre pour preuve de cette inimitié le fait d'une requête qu'il a présentée à l'assemblée législative contre le dit juge, dans laquelle le dit intimé se plaignit du dit juge, et demanda une enquête sur sa conduite pour les causes spécifiées dans la dite requête, dont copie est an-

nexée. C'est pour quoi, à défaut par le dit juge de se déporter et de s'abstenir de juger, le dit intimé, pour les causes susdites, le récusé formellement, et, sur ce, demande que les causes de récusation soient jugées bonnes et valables ; conclut à ce qu'il soit ordonné que le dit juge n'assistera pas aux plaidoiries, et encore moins au jugement à intervenir en cette cause."

SIR L. H. LAFONTAINE, Baronnet, Juge-en-Chef :—Il s'agit d'une requête en récusation de l'un des honorables juges de cette cour, présentée par l'intimé, signé de lui et de son procureur *ad litem* ; l'intimé, l'un des plus anciens avocats de ce barreau, plaidant lui-même sa cause à l'audience. Il avait d'abord cru pouvoir présenter cette récusation verbalement, mais il lui fut de suite observé qu'une récusation de cette nature ne pouvait être faite que par écrit, ainsi qu'il est requis par le 23<sup>e</sup> article du titre 24 de l'ordonnance de 1667.

Pour justifier cette récusation, l'intimé s'appuie sur le 8<sup>e</sup> article du même titre de l'ordonnance, lequel article est en ces termes : " Le juge pourra être récusé pour *menace* par lui faite verbalement ou par écrit depuis l'instance, ou dans les six mois précédents la récusation proposée, ou *s'il y a eu inimitié capitale*." Le dernier de ces motifs est celui qui est énoncé dans la requête dans laquelle l'intimé représente ce qui suit : " Qu'entre l'honorable T. C. Aylwin, un des juges de cette cour et l'intimé, *il y a inimitié capitale*, et au désir de l'ordonnance, le dit intimé offre pour preuve de cette inimitié le fait d'une requête qu'il a présentée à l'assemblée législative contre le dit juge, dans laquelle le dit intimé se plaignit du dit juge, et demanda une enquête sur sa conduite pour les causes spécifiées dans la dite requête, dont copie est ci-annexée. C'est pourquoi, à défaut par le dit juge de se déporter et de s'abstenir de juger, le dit intimé, pour les causes susdites, le récusé formellement, et, sur ce, demande que

les causes de récusation soient jugées bonnes et valables ; conclut à ce qu'il soit ordonné que le dit juge n'assistera pas aux plaidoiries, et encore moins au jugement à intervenir en cette cause."

Il appert par le journal de l'assemblée législative que la requête de l'intimé contre l'honorable juge Aylwin fut en effet présentée à cette branche de la législature, le 9 novembre 1854 ; mais aussi il appert en même temps par ce journal, que, le 1er. mars 1855, une motion faite à l'effet de renvoyer la dite requête, *a passé dans la négative*, c'est-à-dire que l'assemblée législative a rejeté la plainte de l'intimé, en refusant, *in limine*, de donner suite à sa requête.

Que l'on remarque que c'est du *seul fait* de la présentation de cette requête à l'assemblée législative en 1854, que l'intimé argue l'existence, même encore à l'heure qu'il est, entre l'honorable juge Aylwin et lui, d'une *inimitié capitale*, aux termes et dans le sens de l'article 8 du titre 24 de l'ordonnance de 1667, sans dire néanmoins si cette inimitié existe chez les deux, ou chez l'un d'eux seulement, et chez lequel.

L'intimé devait savoir qu'il ne suffit pas que cette *inimitié* existe dans le cœur de la partie qui veut récuser, ou que les *menaces*, lorsqu'il y en a eu de faites, viennent de la part de cette partie, mais qu'il faut faire remonter au juge lui-même cette inimitié ou ces menaces. Il s'est bien donné de garde d'affirmer qu'il en était ainsi, et pour cause, comme on le verra bientôt, quand je ferai l'exposé du nombre de procès que, depuis sa requête à l'assemblée législative, il a eu occasion de soumettre à la décision de ce tribunal, sans aucune tentative de sa part de récuser l'honorable juge Aylwin.

Nous lisons dans *Serpillon*, sur l'article 8, de l'ordonnance de 1667 ; " Il faut que les injures ou les menaces soient du fait du juge, et non du fait de la partie au juge, parce qu'un

chicaneur qui voudrait se préparer un moyen de récusation contre un juge dont il redouterait l'intégrité, ne manquerait pas de lui dire des injures, ou de lui faire des menaces. Ce ne sont donc que les menaces de la part du juge, ou les injures par lui faites à la partie depuis l'instance, ou dans les six mois précédents, qui peuvent donner lieu à la récusation du juge..... *L'inimitié capitale doit-êtré proposée du chef du juge que l'on récuſe, ſans quoi les moyens ne ſont pas pertinents.*" Le même auteur avait déjà dit, ſur l'article 1er. du même titre de l'ordonnance : " On peut récuſer un juge, ſ'il eſt ennemi capital d'une partie, etc. etc. ; mais il faut que les cauſes d'inimitié ſoient particulièrement déclarées."

Comment l'intimé aurait-il pu *particulariſer* ces cauſes, lorsqu'il ſ'eſt donné bien de garde d'alléguer que le juge Aylwin nourriſſait aucune inimitié contre lui ? S'il l'eût fait dans cette occaſion, il ſavait qu'il trouvait une condamnation, et une condamnation bien ſévère, dans ſes propres actes antérieurs. En effet, depuis la préſentation de ſa requête contre le juge Aylwin, requête repouſſée par le corps auquel elle avait été préſentée, nous ne comptons pas moins de ſept procès dans leſquels l'intimé, comme partie, a eu à comparaître devant ce tribunal, ſavoir :

Banque du Peuple et Gugu :—Gugu et Larkin :—Gugu et Hemming :—Gugu et Sutherland :—Gore et Gugu :—Daly et Gugu :—Renaud et Gugu ; c'eſt la préſente cauſe.

Dans les ſix premières de ces cauſes, en ne récuſant pas l'honorable juge Aylwin, et en acceptant ſon concours aux jugements dans celles de ces cauſes qui ont déjà été décidées, l'intimé ne proclamait-il pas hautement devant ce tribunal, devant ſes confrères du barreau, devant le public, qu'il n'avait aucune cauſe de récuſation à propoſer contre l'honorable juge Aylwin, bien moins encore à raiſon d'une prétendue *inimitié capitale* que, ſubiſſant l'aberration la plus étrange, il nous dit aujourd'hui exiſter ? Si cette ini-



mitié existe, il est évident qu'elle n'existe que chez l'intimé ; et croit-il que nous allons, par un oubli coupable de nos devoirs, donner libre cours à des sentiments aussi répréhensibles de sa part ? Qu'il se détrompe à cet égard ; il en est grandement temps,

Ce n'est qu'hier que l'intimé a jugé à propos de s'enghardir jusqu'à présenter cette requête en récusation. C'était le quatrième jour juridique de ce terme ; et cependant ce n'est pas la première fois que l'intimé a soumis cette cause à notre délibéré. Dès le premier jour de ce terme, samedi dernier, il a fait une motion sur laquelle nous avons eu à prononcer. Il n'a pas été question de récusation. Le juge Aylwin a pris part au jugement. Cependant, la cause que l'intimé assigne à sa récusation lui était connue alors, puisque c'est lui qui l'a fait naître. Pourquoi ne l'a-t-il pas proposée samedi dernier ? Assurément un avocat, de l'ancienneté et de l'expérience de l'intimé, ne pouvait ignorer que l'ordonnance qu'il invoque, porte ce qui suit, titre 24, article 19 : “ Enjoignons pareillement aux parties qui sauront des causes de récusation contre aucun des juges, pour parenté, alliance, ou autrement, de les déclarer et proposer, aussitôt qu'elles seront venues à leur connaissance.”

L'intimé fait remonter à un fait qui lui est exclusivement personnel, l'*inimitié capitale* qu'il dit exister aujourd'hui entre l'Honorable Juge Aylwin et lui. Les mots, *inimitié capitale*, dont il se sert, sont les mots même de l'article 8 du titre 24 de l'ordonnance, Or, voici ce que nous devons entendre par ces mots, d'après le commentaire de *Rodier* sur cet article : “ On peut dire qu'une inimitié capitale est une inimitié décidée, connue, manifestée, occasionnée par l'homicide de quelqu'un de nos proches, par des querelles, des affaires d'honneur, ou d'un gros intérêt, dont le ressentiment porterait à saisir les occasions d'attenter à la vie, à l'honneur, ou aux avantages temporels de son ennemi.”

Quelque grande qu'ait été l'aberration de l'intimé, elle ne l'a pas porté cependant jusqu'à se compromettre au point de faire aucune assertion de la sorte. C'est un acte de prudence qu'il est juste, en passant, de noter à son avantage. Sur quel fondement, sur quelle raison, peut-il donc espérer que cet acte étrange de récusation, et peut être plus qu'étrange, soit accheilli ? Il n'y a qu'un moyen de se l'expliquer. Et ce moyen, je pense que l'intimé, après mûre réflexion, nous saura gré de le passer sous silence.

"Inimitié capitale," dit-il. Bien, il veut absolument nous faire croire à l'existence de cette inimitié. Soit ; mais après avoir plaidé, comme partie privée, tant de procès, y inclus le présent, et avec tant de confiance, devant l'Honorable Juge Aylwin lui-même, c'est le comble de l'absurdité de nous demander à déclarer que cette inimitié existe chez notre confrère contre l'intimé. Mais puisque l'intimé veut absolument proclamer que cette inimitié existe, alors je dois dire, et je le dis avec regret, qu'elle n'existe, et ne peut exister, que chez lui. Dans ce cas, s'il a bien voulu la laisser assoupie pendant quelque temps, au point même de faire croire qu'elle n'existait pas, ou que, si elle avait existé, il y avait eu oubli ou pardon de prétendues injures reçues, c'était sans doute pour mieux saisir l'occasion, qu'il croirait la plus favorable, de faire revivre cette inimitié plus forte que jamais, en calculant froidement et à loisir les moyens d'en tirer le meilleur parti possible pour satisfaire à des fins que la justice et l'honnêteté condamnent dans tous les temps et dans tous les lieux. C'est vraiment, de la part de l'intimé, nous présenter le spectacle anti-chrétien d'une inimitié qui doit être implacable et durer toute sa vie, dût l'administration de la justice être sapée jusque dans ses principes les plus sacrés.

Si, malheureusement, il se trouve des personnes qui, comme l'intimé, croient que l'oubli des injures ou des ressentiments, vrais ou imaginaires, n'est pas une vertu, qu'au contraire, les ressentiments conçus à tort ou à droit, doivent

durer toujours, j'aime à croire que ces personnes, pour l'honneur de l'humanité, ne forment qu'une bien faible exception, exception qu'il faut prendre en pitié.

Telle, je regrette de le dire, me paraît être la position plus qu'étrange que l'intimé, peut-être sans le vouloir, s'est faite devant cette Cour. Une chose me console néanmoins, c'est que je suis convaincu que les membres du Barreau ne prendront jamais, pour se guider en matière de récusation, le précédent que l'intimé aurait voulu établir, et qu'ils se donneront bien de garde de présenter à leurs élèves, comme un modèle à suivre, le procédé de l'intimé en la présente occasion.

Je termine en déclarant, selon les termes de l'Ordonnance et des auteurs qui l'ont commentée, que la récusation présentée par la requête de l'intimé, est frivole, injurieuse, impertinente et inadmissible, et doit être déclarée telle par cette Cour.

BELLEAU et JOLICOEUR, pour l'appelant.

SMITH, pour l'intimé.

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SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1054.	{	CÔTÉ <i>et al.</i> .....	Plaintiffs.
		vs.	
		MORRISON .....	Defendant.

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Held:—That the prescription of five years, under the first part of the 31st. section of the 12th. Vict., ch. 22, applies to all notes due and payable previous to the passing of the said Statute.

Jugé :—Que la prescription de cinq ans, en vertu de la première partie de la 31<sup>me</sup>. section de la 12<sup>me</sup>. Vict., ch. 22, s'applique à tous billets dus et payables antérieurement à la passage du dit Statut.

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Judgment rendered the 30th. April, 1858.

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The action was instituted by the plaintiffs, as heirs of the late Pierre Côté, their brother, to recover the amount of a

promissory note dated 24th. July, 1826, made by the defendant, and payable to Pierre Côté, or order. It does not appear from the note where it was made, but the declaration alleges it was made in the State of Michigan.

1st. plea : Prescription of five years generally.

2nd. plea : Prescription of five years under the 12th. Victoria, chap. 22.

3rd. plea : Prescription under the laws of the State of Michigan.

4th. plea : *Défense en fait*.

Answer to 1st plea, that the defendants were bound to make oath ; and 2nd., interruption of prescription.

2nd. Answer : Demurrer to 2nd. plea, heard on the merits.

3. General answers to the three exceptions.

SMITH, Justice :—I consider the proof of the plaintiffs as to their being heirs of the payee of the note sufficiently made out by the certificates and proof of record.

The plea of prescription to the note mentioned in the declaration under the 12th. Vict., ch. 22, is well founded.

The cases of Fisher vs. Russell, and Wing vs. Wing (1), were referred to at the argument, but these cases are not analogous to the case now before the Court. In Fisher vs. Russell, the notes and bills to which it was sought to apply the plea of prescription, were dated in 1835, and were due and payable long before the Act of 1849 ; but the action was brought in 1851, before the expiration of five years from the time the Act of 1849 came into force. In that case, I held that the Act 34th. Geo. III was repealed, and that the Statute of 1849, was not applicable to the case. To that opinion I still adhere. Had the five years elapsed after the passing of the 12th. Vict. before the action was brought, the

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(1) 4 L. C. Rep., pp. 237, 261.

first part of the 31st. section of the Statute of 1849 would have applied.

The same doctrine was held in *Wing vs. Wing*, but in that case also, five years had not elapsed since the Statute of 1849 came into force, the note in that case being dated in December, 1845, and the judgment was to the effect that there was no law in existence by which the defendant could invoke the prescription of five years.

In the present case the note is dated in 1826, and the action was brought in December, 1855. The Statute of 1849 is therefore applicable to the case, and the plea of prescription under it must be maintained, and the plaintiffs' action dismissed.

JUDGMENT:—"Considering that the said defendant hath established that more than five years have elapsed between the bringing of the present action, and the day on which the 12th. Victoria, ch. 22, became law and in force in this Province, and that the promissory note sued on by the said plaintiffs, *es-qualités*, was, at the time of the institution of the present action, by force of the said Statute 12th. Victoria, ch. 22, prescribed in law, the said promissory note being due and exigible at and before the time of the passing of the said law, and the action of the plaintiffs in this behalf barred. And further considering that the said plaintiffs have failed to establish by legal and sufficient evidence that the said prescription, so set up as a bar to the said action, was in any way interrupted, by reason of which, and by force of law, the action of the said plaintiff could be maintained, or by reason of which the conclusions of the said defendant in his said plea of prescription, secondly pleaded, should not be granted, the Court doth maintain the said plea of prescription, and doth dismiss the said action, with costs."

DOUTRE and D'Aoust, for plaintiffs.

STUART, HENRY, for defendant.

## SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1659.—*Ex Parte LEDOUX* .....*For Certiorari.*

Held :—That a conviction by the Recorder of Montreal for a penalty for constructing a wooden building within the city limits, contrary to a By-Law of the Corporation, will be quashed, no notes of evidence having been transmitted to the Court above to shew whether the applicant fell within the provisions of the By-Law as being a *proprietor*, or whether, as sworn to in his affidavit, he was merely a *workman* employed by the proprietor.

Jugé :—Qu'une conviction par le Recorder de la cité de Montréal, pour une pénalité pour avoir érigé une bâtisse en bois dans les limites de la dite cité, en contravention à un règlement de la Corporation, sera annulée, *quashed*, aucunes notes du témoignage n'ayant été transmises au tribunal supérieur pour constater que le requérant tombait sous l'opération du règlement, comme propriétaire, ou si, tel qu'allégué dans son affidavit, il était seulement un ouvrier employé par le propriétaire.

Judgment rendered the 27th. March, 1858.

In this case, the applicant was condemned by the Recorder of Montreal to pay a penalty of five pounds, and to imprisonment for one hour, for having "constructed a wooden building of one story high, over the foundation of an ice house being about eight feet in height, situated &c. contrary to the By-Law of the Corporation, No. 222."

SMITH, Justice :—The applicant states positively, in his affidavit, that he appeared by counsel in the Recorder's Court, and pleaded that he only acted under the orders of the proprietor of the lot, and as an *ouvrier*. This has several times been held in this Court, to be a sufficient defence ; but how is the Court to know what took place at the trial ? The Recorder sends up no notes of evidence, and thinks himself justified under a clause in the Act incorporating the city, in not *taking* any notes of evidence. This has been remarked upon more than once by this Court. How long shall such a system be continued, destructive as it must be, of the best interests of the community ? The plain inference is, that the Recorder wishes his Court to be independent of all other tribunals, that he may decide as he pleases. What is to be done in this case ? If the defendant was proprietor of the lot, the Court below had jurisdiction

over him under the By-Law, but otherwise it had not. I think myself justified in quashing the conviction with costs. Conviction quashed.

LORANGER and POMINVILLE, for applicant.

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SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1208. { FRELIGH ..... *Plaintiff*.  
vs.  
SEYMOUR. .... *Defendant*.

Held :—That an opposition cannot be maintained on the ground that the bailiff making the seizure was not a sheriff's bailiff, the writ of execution having been delivered to him by the sheriff.

Jugé :—Qu'une opposition fondée sur ce que l'huissier faisant la saisie n'est pas un huissier du shérif, ne peut être maintenue, le writ d'exécution ayant été remis à tel huissier par le shérif.

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Judgment rendered the 27th. February, 1858.

SMITH, Justice :—In this case a writ of execution issued against the plaintiff for costs, and an opposition was filed by her to the sale of the moveables seized. The grounds relied on at the argument were, that the bailiff who made the seizure, was not a sheriff's bailiff, that none but the sheriff, or his deputy, or a bailiff named by the sheriff, could execute the writ, and because the bailiff had styled himself a bailiff of the Superior Court, and as such, had no quality to seize.

The opposition is manifestly unfounded. It is admitted upon the record that the warrant was delivered to the bailiff by the sheriff, and the sheriff has adopted his acts, and made his return accordingly to the Court. The opposition must be dismissed.

Judgment dismissing opposition with costs.

ROBERTSON, A. and G., for plaintiff.

CROSS and BANCROFT, for opposant.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.  
EN APPEL.

Présents :—Sir L. H. LaFontaine, Baronnet, Juge en Chef,  
AYLWIN, DUVAL et CARON, Juges.

{ LANGUEDOC *et ux*..... Appelants.  
et  
{ LAVIOLETTE.....Intimé.

Jugé :—1o. Qu'un mariage célébré aux États-Unis entre deux personnes ayant leur domicile dans le Bas-Canada, et dont l'une (la femme) était mineure et n'avait pas le consentement de son tuteur, est valable, et emporte communauté de biens.

2o. Qu'un contrat de mariage subéquent, fait dans le Bas-Canada, du consentement et en la présence du tuteur, stipulant, pour sa mineure, séparation de biens, et suivi d'une célébration en face de l'église, ne peut avoir d'effet; et que cette nullité peut être invoquée par le tuteur lui-même sur une action en reddition de compte portée contre lui par la mineure comme séparée de biens d'avec son mari, ce dernier étant débiteur personnel du dit tuteur.

Held :—1o. That a marriage contracted in the United States between two parties having their domicile in Lower Canada, though one of them (the wife) was a minor and had not the consent of her tutor, is valid in law, and that under such marriage, community of property is created.

2o. That subsequent articles or covenants of marriage, executed in Lower Canada, with the consent and in the presence of the tutor, acting for and in the name of his pupil and stipulating *séparation de biens*, and followed by a marriage duly solemnised, can have no effect; and that such nullity may be opposed by the tutor himself, in an action *en reddition de compte* against him by the minor separated as to property from her husband, who was personally indebted to the said tutor.

Jugement rendu le 4 Mars, 1858.

Le 25 septembre 1849, les appelants, Languedoc et L. A. A. Beaudry, alors mineure, se rendent à Champlain, dans l'état de New-York, et là, devant un juge de Paix, sont conjoints en mariage et reviennent de suite dans le Bas-Canada, où tous deux avaient leur domicile.

Le 23 octobre suivant, par acte devant Lanctot et son confrère, notaires, le dit George Languedoc et l'appelante, agissant au dit acte par l'intimé, son tuteur, stipulant pour et au nom de sa pupille, firent des accords et conventions de mariage, par lesquels il fut entre autres choses stipulé que les époux seraient séparés de biens; et le 27 Oct., il fut célébré un mariage devant le curé de la paroisse où résidait l'épouse.



Subséquentement les appelants intentèrent une action contre l'intimé en reddition de compte de la gestion et administration qu'il avait eue des biens de la dite appelante, qui, dans sa déclaration, se qualifie de femme séparée de biens, invoquant comme seul mariage legal celui qui avait été célébré le 27 octobre, 1849.

C'est sur ce point qu'à roulé la contestation en la cause ; l'intimé ayant plaidé que le contrat de mariage du 23 Oct., et la célébration du mariage du 27 étaient nuls, les appelants ayant été légalement mariés dès le 25 Sept., 1849, à Champlain, comme susdit, ce mariage y ayant été célébré suivant les lois en force en cet état, l'intimé alléguant de plus qu'il avait intérêt à faire cette contestation, en autant que l'appelant lui était personnellement endetté en une somme considérable, et que ce dernier se mariant ainsi à Champlain, étant domicilié dans le Bas-Canada, ce mariage avait suivant nos lois créé une communauté de biens entre Languedoc et sa femme, donnant ainsi lieu à compensation ; que l'action de l'appelante comme séparée de biens ne pouvait conséquemment pas être maintenue.

Le 30 mai, 1857. La Cour Supérieure, à Montréal, rendit le jugement suivant :

“ Considering that the plaintiffs have failed to shew that  
 “ by reason of the pretended contract of marriage in the said  
 “ declaration set forth, and alleged to have been executed  
 “ on the 23rd Oct., 1849, or by reason of any other matter  
 “ or thing in the said declaration alleged, and by law, any  
 “ separation as to property, (*séparation de biens*), between  
 “ the said L. A. A. Beaudry, one of the plaintiffs, and the  
 “ said G. Languedoc, the other of the plaintiffs, was at any  
 “ time before the institution of this action, established or  
 “ did subsist, or that she the said plaintiff was entitled to  
 “ the separate enjoyment and administration of her property  
 “ and estate, in as much as the plaintiff, long before the  
 “ execution of the said pretended contract of marriage, that

" is to say, on the 25th Sept., 1849, had contracted and been  
 " conjoined in lawful marriage at Champlain, in the State  
 " of New York, one of the United States of America, ac-  
 " cording to the laws in force in that state, and by reason of  
 " the said marriage, of the 25th Sept., 1849, and under and  
 " by virtue of the laws in force in Lower Canada, where the  
 " plaintiffs for a long time before had been and then were,  
 " and ever since have been, resident and domiciled, a com-  
 " munity of property, *communauté de biens*, was established  
 " and doth subsist by and between the said George Lan-  
 " guedoc and L. A. A. Beaudry, his wife. And considering  
 " that the defendant hath alleged and proved that he had  
 " an interest and right, by law, to except to, and contest the  
 " validity and legal effect of the said pretended contract of  
 " marriage, and that by reason of the premises, and by law,  
 " the action of the plaintiffs, founded upon the said pretended  
 " contract of marriage, and more especially upon the clause  
 " and stipulation of separation as to property, *séparation de*  
 " *biens*, therein contained, ought not to be maintained in the  
 " manner and form in which the same has been instituted ;  
 " maintaining the exception of the defendant, in this cause  
 " pleaded, doth dismiss the action of the plaintiffs with costs,  
 " reserving to the plaintiffs, such recourse as, by law, they may  
 " be entitled to, (M. le juge Chabot différant d'opinion)."

De ce jugement appel fut interjeté, les appelants soutenant, 1o. Que la présence seule de l'intimé au contrat de mariage était suffisante pour faire repousser son exception (1). Que dans le cas actuel, ce n'est pas la loi du lieu où le mariage a été célébré, mais celle du domicile des parties qui doit déterminer la validité ou invalidité du mariage fait à Champlain, (2) et que d'après les lois du Bas-

(1) Autorités citées par les appelants :

Louet, lettre N., no. 6 :—Lemerle, Fins de non recevoir, pp. 192 et suivantes.

(2) Feelix, Droit International, nos. 86, 87 et 88 :—Loché, Discussion du Tit. 5 du Code Civil, Exposé des motifs :—Pothier, Cont. de Mariage, nos 229, 325, 326, 327, 333 et 363 :—Cochin, vol. 1, p. 189 : vol. 2, pp. 42, 46, 47, 642 et suivantes :—Martin, Repert., vbo. Domicile :—Toullier, vol. 1, no. 526 :—Code Civil, Art 170 :—Story Conflict of Laws, §§ 87 et 117 :—1 Burge, Colonial Laws, p. 199 :—3 Martin's Reports, p. 60.

Canada tel mariage était sans valeur quant aux effets civils (1).

L'intimé soutenait de son côté que le mariage célébré à Champlain avait tous ses effets en Canada, comme s'il eût été contracté par des domiciliés du lieu ; (2) que le tuteur ne pouvait, par sa présence au contrat de mariage, lui donner une validité qu'il n'avait pas ; (3) Que les époux ne pouvaient opposer la nullité du premier mariage célébré à Champlain (4) ; et qu'ils auraient dû obtenir préalablement un jugement mettant ce premier mariage au néant (5).

**AYLWIN, Juge, dissidente** :—L'appelante en cette cause, mineure de 17 ans, et sous la puissance de l'intimé, qui était marié à la mère de l'appelante, s'échappe du domicile de son tuteur, passe la ligne, et fait avec l'appelant la cérémonie du mariage, puis tous deux reviennent en Canada. Un mois après, des conventions matrimoniales ont lieu, et prenant le contrepied de la farce jouée aux Etats-Unis, on procède convenablement au mariage, qui est précédé d'un contrat auquel était présent l'intimé tenant la place de père et donnant sa sanction. Plus tard, il est appelé à rendre compte à cette mineure de l'administration qu'il a eue de ses biens ; il en rend deux qui sont impuignés d'inexactitude, ensorte que les appelants sont obligés de se pourvoir en justice, et de là la présente action portée par les appe-

(1) Pothier, Mariage, nos. 69, 149, 349, 355 et 229 :—Guyot, Repert, vbo. Mariage, pp. 368 et 366 :—Duranton, nos. 327 et 238 :—Damolombe, no. 223, 3e alinea : no. 225, pp. 344 et 348 :—Merlin Repert, vbo. Religioneiro, 56.

(2) Autorités de l'intimé :

Fœlix, nos. 11 à 16 ; no. 49, p. 88 :—Story, Conflict of Laws, nos. 79, 80 ; p. 117, notes, § 124 :—Code Matrimonial, Leridan, p. 769 :—Leprestre, Mariages Clandestins, pp. 810 et suiv., 380, 380 :—Pothier, Mariage, nos. 325, 336, 324, 337 :—16 Vio, ch. 198 :—Dense et McIntosh, Banc de la Reine, en appel :—19 Merlin, Repert., p. 480 :—Lemerle, p. 299 :—1 Boullenois, pp. 800-2 :—Guyot, Repert., vbo. Contre-lettre :—Grand Com. de Ferrière, vol. 3, sur art. 282 :—Chitty, Conflict of Laws pp. 180, 182.

(3) Lemerle, pp. 392-5.

(4) Pothier, Mariage, nos. 323, 333 et 324

(5) Arrêts de Bardet, vol. 2, arrêt du 17 juin, 1638 :—Merlin, Repert., vbo. Mariage, sect. 6 § 1 :—Pothier, Mariage, no. 229 :—Bourjon, vol. 1, p. 14, sect. 16 :—Ferret, de l'Abus, vol. 1, pp. 416-7 :—Jouet, Bibliothèque des Arrêts, p. 476, vbo. Mariage :—Cochin, vol. 6, p. 468 :—Burge Col. Laws, pp. 192-4 :—Revue Etrangère et Française, 1841, p. 433.

- lants, et dans laquelle ils n'invoquent que le mariage célébré en second lieu.

Quelle défense fait Laviollette ? Il oppose une fin de non recevoir dans laquelle il admet bien que le mariage allégué à eu lieu en effet, mais qu'il est nul en autant qu'un autre mariage avait été consommé avant. Et ce n'est pas là une subtilité dit-il, car le mari me doit £2000, et j'ai intérêt à ce qu'il y ait communauté de biens entre les appelants ; et quoique j'aie été le gardien des intérêts de la mineure, j'entends me faire payer à ses dépens, des créances que j'ai contre son mari. Il conclut à ce que le mariage allégué dans la déclaration soit déclaré nul, et que l'action soit déboutée avec dépens.

En supposant la prétention de l'intimé bien fondée l'action ne devait pas être déboutée, le mariage étant admis, mais l'intimé devait rendre compte sauf à compenser. La qualité essentielle des appelants pour porter l'action, était celle de mari et femme ; cette qualité existait indépendamment de la forme du contrat, et cependant, la Cour inférieure a renvoyé l'action sans adjuger sur la matière mise en question par cette action. Cette circonstance seule suffirait pour faire renverser le jugement de la cour inférieure, car le seul jugement qu'elle pouvait, et qu'elle devait, rendre était d'obliger l'intimé à rendre compte. Mais il y a une autre question à juger, c'est de savoir quelle est la valeur des mariages contractés comme celui qui est allégué par l'intimé. On ne doit certainement pas les envisager ici comme en Angleterre, mais les juger suivant les lois du Bas-Canada qui diffèrent des lois d'Angleterre. En effet, la légitimation par mariage subséquent, qui a lieu ici, n'est pas reconnue en Angleterre, et les mariages de Gretna Green, tolérés en Angleterre, ne pourraient valoir ici. Burge (1) donne comme une règle que le mariage est régi par le domicile d'origine. Nous n'avons pas d'autre règle ici. Il

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(1) Colonial Law.

existe une autre règle sur le continent d'Europe qui est inconnue en Angleterre, et qui frappe de nullité tout mariage contracté en fraude des lois de son pays, voyez Huberus ; Pothier ; Voët ; Burgundus ; Bowyer's Public Law ; Wheaton's Elements of International Law.

Comment cette cause doit-elle être décidée sous la loi du Bas-Canada ? Les appelants étaient tenus de célébrer leur mariage devant leur propre curé. Sous l'ancien droit français on trouve une foule de cas où les Cours ont prononcé la nullité absolue de mariages célébrés devant un autre que le curé des époux (1). Je ne puis comprendre qu'une mineure, allant aux États-Unis, et y séjournant une demie heure, puisse, par là, se soustraire aux lois de ce pays, et s'allier ainsi à un homme sans aveu, et le faire entrer ainsi dans une famille qui jamais n'aurait voulu l'admettre. Il aurait fallu, dit-on, faire déclarer nul le premier mariage. — Mais comment s'y serait-on pris ? En France on procédait par l'appel comme d'abus ; dans le cas actuel ceci ne pourrait avoir lieu, et je ne vois pas comment on aurait pu procéder, nonobstant le cas cité de M. DeRouville, rapporté à la page 40 des jugements du Conseil Supérieur, en date du 12 juin 1741.

Je suis convaincu que l'acte fait aux États-Unis, était fait en fraude de nos lois, et que lorsqu'on en appelle aux lois étrangères, ce doit être à condition qu'elles ne soient contraires ni aux nôtres ni aux bonnes mœurs.

Il y a un trait remarquable dans la réponse que fait l'intimé à l'allégation de sa connivence et coopération au second mariage. Il dit qu'il ne s'est jamais opposé au premier mariage, et ne l'a jamais contesté ; et qu'il n'a signé l'acte et les stipulations du second mariage que pour faire plaisir aux appelants. Je n'hésite pas à dire qu'il n'y a jamais eu pareil exemple de cynisme. Quoi, un tuteur,

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(1) 8 Poulain DuParc, no. 111, p. 340 :—Charondas 19, ch. 3, p. 181, et ch. 1, p. 160 :—1 Cochin, pp. 157 et 154, et l'art du Code.

qui a prêté serment de veiller aux intérêts de la pupille qui lui est confiée, ne craint pas de dire qu'il lui est loisible de faire déclarer nul le mariage de cette pupille, mais que si ses propres intérêts peuvent en être affectés, il ne le fera pas ? Ce procédé est une insulte jetée à la face de la justice. C'est pour ainsi dire un vol commis au détriment de sa pupille. Oui, il avait droit de demander la nullité de ce mariage, mais seulement dans l'intérêt de la mineure, et non autrement, et il ne pouvait invoquer l'absence de cette demande en nullité pour toucher, sur les biens de celle qu'il devait protéger, une somme aussi considérable que celle qu'il réclame aujourd'hui.

Cette demande en nullité devait être portée dans l'intérêt exclusif de la demanderesse ; c'était l'intérêt de sa pupille qu'il aurait dû voir à conserver lui même. L'acte de conventions matrimoniales qu'il a signé doit être regardé comme une transaction, c'est le meilleur jugement que l'appelante pouvait avoir. La règle qui veut que les conventions de mariage précèdent la célébration n'est pas absolue ; il y a des cas d'exception où la partie peut être relevée pour cause de lésion, et elle a dix ans à compter du jour de sa majorité pour se pourvoir (1). Mais celui qui, comme l'intimé dans le cas actuel, aura signé l'acte, pourra-t-il demander d'être soustrait aux conséquences d'une fausseté qu'il a signée ? Non certainement. J'aurais, pour ma part, renversé le jugement dont est appel ici, ordonné à l'intimé de rendre compte, et repoussé toute tentative de l'intimé de compenser le reliquat de compte par le moyen des créances qu'il avait contre le mari.

SIR L. H. LA FONTAINE, Baronnet, Juge-en-Chef :—Il ne s'agit pas ici de reliquat de compte, ni de savoir s'il y a lieu à compensation. La seule question que nous ayons à juger, est de savoir si le mariage célébré aux États-Unis par des personnes domiciliées dans le Bas-Canada est nul ou non.

(1) Troplong, *Contrat de Mariage*, nos. 237, 228 et 288 :—Dalloz, année 1830, 2<sup>me</sup> partie.

La doctrine que le mariage, pour être valide, doit être célébré devant le propre curé, si elle était admise, devrait s'appliquer aux majeurs comme aux mineurs, et si le mariage célébré autrement était radicalement nul, nous aurions dû le dire dans la cause de Laroque et Michon ; cependant la Cour a, dans cette dernière cause, été d'opinion que le mariage était valable. L'intérêt des nations chrétiennes est de reconnaître et valider les mariages. Quant à l'autorité de Troplong, qui a été citée, elle ne s'applique qu'aux dispositions du code civil, et nullement à l'ancien droit. Je dis que si le défaut d'autorisation n'entraîne pas la nullité, l'absence du curé ne peut avoir plus d'effet.

Mais nos lois prononcent-elles, en ce cas, la nullité absolue du mariage ? Les anciens auteurs le reconnaissent valable en thèse générale ; cependant la nullité peut en être demandée par le père, la mère, le tuteur ou curateur, et, sur appel, tels mariages pouvaient être déclarés abusifs et nuls (1). S'il faut juger que le mariage fait hors de la présence du propre curé est nul, que de mariage en ce pays qui se trouveront sans effet. Le contrat de mariage est du droit des gens, et on doit l'admettre lorsqu'il est contracté suivant l'usage du lieu où il est célébré ; c'est ainsi qu'on admet les mariages faits chez les sauvages, quoique dépourvus des formalités prescrites par nos lois. Mais on dit que le mariage aux États-Unis a été fait en fraude de la loi du pays. Je ne vois pas comment. Si ce mariage eût eu lieu au pays il aurait été également frauduleux. Ce n'est pas parce qu'il a été contracté à l'étranger, mais seulement parce qu'il l'a été sans le consentement du tuteur, que la nullité en pourrait être demandée, et par le tuteur seul. Les demandeurs ne se trouvent dans aucun des cas où la loi leur permettrait de le faire. En l'absence des père et mère qui sont décédés, le tuteur aurait pu la demander ; mais, loin de là, il en réclame le maintien. Je ne prononce aucune opinion sur la demande qui en serait faite par une per-

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(1) Ord de Blois :—Bardet, Ord. du 17 juin 1738.

sonne de compétence, non plus que sur celle de savoir si en déclarant le mariage aux Etats-Unis valable, les Cours ne doivent pas venir au secours des mineurs. Nous adjugeons seulement sur la contestation telle que soulevée, en confirmant le jugement de la Cour de première instance.

CARON, Juge :—Les questions que nous avons à juger se réduisent à deux, savoir : le mariage invoqué dans la déclaration des demandeurs en Cour Inférieure est-il valable, et l'intimé pouvait-il, lui, invoquer sa nullité dans l'action portée contre lui.

Si la première question était posée par le père ou la mère, je serais à peu près décidé à dire que le mariage pourrait être mis de côté, comme fait pour éluder la loi, et conséquemment nul, et que les tribunaux ont droit de prononcer cette nullité. Je suis d'avis, avec le juge-en-chef, que l'absence du curé ne rend pas le mariage radicalement nul. Mais ces nullités ne peuvent être opposées par les collatéraux. Je pense également que des mariages contractés au pays dans les mêmes conditions, ne pourraient être déclarés nuls.

Il y a une anomalie en cette cause ; c'est que ce sont les époux eux-mêmes qui réclament la nullité du mariage, pendant que le tuteur, dont les droits ont été violés, ne la demande pas.

Mais, admettant la validité du premier mariage, sera-t-il permis à l'intimé d'invoquer, comme il l'a fait, la nullité du second mariage, le seul qui soit allégué dans la déclaration des demandeurs ? J'avoue que la conduite de l'intimé ne mérite pas l'approbation ; mais ici nous n'avons pas à prononcer sur cette conduite et sur la punition due à ce tuteur, cette question viendra lorsque le jugement sera rendu.

Si les demandeurs se trouvent dans l'embarras, c'est qu'ils y ont donné occasion. Le contrat de mariage qu'ils



ont allégués étant nul à l'égard des tiers, comme ayant été fait postérieurement au mariage célébré aux Etats-Unis, pourra-t-il être invoqué contre l'intimé ? c'est encore là une question que nous ne sommes pas appelés à juger aujourd'hui ; mais je dois dire qu'il y a des cas où cela se pourrait.

Jugement du tribunal de première instance confirmé,  
 “ considérant qu’il n’y a pas mal jugé dans le jugement dont  
 “ est appel.”

**CHERRIER, DORION et DORION, pour les appelants.**

**CARTIER et BERTHELOT, pour l'intimé.**

**SUPERIOR COURT.—MONTREAL.**

**Before :—BADGLEY, Justice.**

No. 2463. { KERR ..... *Plaintiff.*  
                  { vs.  
                  { GILDERSLEEVE ..... *Defendant.*

**Held:—**10. That a title to a steamer derived from a sale of the vessel and tackle, under warrant of distress issued by Justices of the Peace, under the Act 6th. Will. IV, c. 23, for the recovery of seamen's wages, is insufficient to maintain an action *en revendication*, the steamer not being shewn to belong to, or to have been registered in. Lower Canada.

2c. That the statute cannot be extended to vessels not belonging to, or registered in, Lower Canada.

30. That where the statute authorizes the sale of a vessel or the tackle and apparel thereof, a warrant ordering the sale of the vessel *and* the tackle and apparel thereof, is illegal.

Jugé :—1o. Que le titre donné sur vente d'un vapeur et de ses agrès, en vertu d'un warrant émané par des Juges de Paix, en vertu de l'acte 6 Guil. IV, ch. 28, pour le recouvrement de gages de matelots, est insuffisant pour maintenir une action en revendication, attendu qu'il n'est pas constaté que le vapeur était du Bas-Canada ou y avait été enregistré.

20. Que l'opération du statut ne s'étend pas à des vaisseaux qui n'appartiennent pas au Bas-Canada, et qui n'y ont pas été enregistrés.

30. Que dans les cas où un statut autorise la vente d'un vaisseau ou de ses agrès, un warrant qui ordonne la vente d'un vaisseau et de ses agrès, est illégal.

**Judgment rendered the 30th. April, 1858.**

This was an action *en revendication* by the plaintiff to recover the steamer "Canadian," with all her tackle and apparel, setting up title under sale made on the 13th Au-

gust, 1855, by a constable under certain warrants of distress issued at the suit of various hands on board the steamer, against one McCormack, master, for wages, the plaintiff being the purchaser at the sale for £310.

1st. plea : That the defendant was the owner of the steamer before and at the date of the pretended sale, and that the plaintiff never was proprietor nor in possession of the vessel.

2nd. plea : That all the proceedings in respect of the alleged judicial sale were illegal ; that the warrants of distress were null and void, and the Justices of the Peace by whom they were issued had no jurisdiction ; that the steamer was never owned or registered in Lower Canada, but was the property of the defendant.

3rd. plea : Sets up the same allegations as are contained in the second plea, alleging also a combination between the plaintiff and the hands or crew of the vessel in bringing complaints illegally, before the Justices of the Peace, and in procuring the warrants of distress to be issued, and in tortiously and surreptitiously selling the vessel.

4th. plea : Sets up illegal and forcible taking of the boat by the plaintiff without legal title.

5th. plea : General issue.

By his answers to the pleas, the plaintiff set up that the steamer was the property of McCormack, master of the vessel, and in his possession ; that the complainants had a lien or privilege on the vessel for their wages ; that the defendant, by agreement of the 23rd. May, 1855, sold the steamer to McCormack, and took his promissory notes for the price, amounting to £2000, and retained them, and had acknowledged McCormack as the owner ; and that even if the defendant was owner, he could not forcibly dispossess the plaintiff without getting the judicial title set aside. The

facts of the case, as they appear in evidence, sufficiently appear from the remarks of the Honorable Judge.

BADGLEY, Justice :—It would appear that on the 4th. May, 1855, an agreement was made at Kingston, between the plaintiff, owner of the steamer "Canadian," and one McCormack, to charter the steamer for four years, at £500 *per annum*, payable by instalments, McCormack agreeing to pay all the expenses of outfit, and to insure the boat. It was agreed that until such payment of the expenses and outfit was made, the boat was to be considered in the defendant's possession. The agreement contained a clause under which the defendant promised to sell and give an absolute title to McCormack of the steamer, on payment of £2000 within two years, and to impute all sums received for charter money on the £2000 mentioned, for which some notes were taken, and are produced by the defendant. Under this agreement, McCormack got possession of the steamer, but on her way to Montreal, she was swamped, and the defendant expended some £300 in getting her afloat. When she was brought to Montreal, McCormack ran her between Lachine and Carillon, the hands were unpaid from the day the boat started to the 15th. June, and a number of complaints or suits for wages were brought against the master, under the authority of the 6th. Will. IV, c. 28.

Convictions were obtained, and warrants of distress issued, under which the plaintiff became the purchaser of the vessel and her tackle, and it is under this title that the action is brought.

I am of opinion that under the statute the plaintiff could not derive, and did not obtain, any legal title, sufficient to support his action. The words of the statute are as follows: "Whereas the masters and owners of vessels belonging to or registered in *this Province*, as well as the "seamen of such vessels, are frequently in case of disputes

“ arising between them, relative to wages, exposed to great  
 “ inconvenience, expense and delay :—For remedy thereof  
 “ be it enacted, etc., that in all cases of wages not exceed-  
 “ ing twenty pounds, sterling, which shall be alleged to be  
 “ due and payable to a seaman, for his service in any such  
 “ ship or vessel belonging to, or registered in this Province,  
 “ as aforesaid ; it shall be lawful for any two Justices of  
 “ the Peace, residing near to the place where such vessel  
 “ shall have ended her voyage, cleared at the Custom  
 “ House, or discharged her cargo, or near the place where  
 “ the master or owner upon whom, respectively, the claim  
 “ is made, shall be or reside, upon complaint on oath to be  
 “ made to such Justices, by any such seaman, or on his  
 “ behalf, to summon such master or owner to appear before  
 “ them, to answer such complaint,” etc., etc.

These words, which are part of a local law applicable to certain vessels, cannot be extended to other vessels.

In certain of the convictions, the “ Canadian ” is stated to be a vessel “ belonging to and duly registered in this “ Province,” the Province of *Canada* ; but this cannot alter the facts nor affect the judgment to be rendered in this cause.

The declaration sets out and relies on the conviction, and the conviction is bad on the ground mentioned, and besides it is not in the words of the statute, which says : “ In case “ sufficient distress cannot be found, it shall be lawful for “ such Justices of the Peace to cause the amount of such “ wages and expenses to be levied on the ship in respect “ of the service on board which the wages are claimed, or “ *the tackle and apparel thereof*,” etc.

The convictions order the distress to be levied “ on the “ steamer *and* the tackle and apparel thereof.” The view taken of the conviction renders it unnecessary to consider the other points in the case.

There is another action by the same plaintiff against the defendant, in damages, for taking possession of the steamer and removing her from her moorings. This he had no right to do, for he took the law into his own hands, and judgment will go against him for £10 damages.

JUDGMENT :—" Considering that the said vessel or steamer, " in the plaintiff's declaration mentioned, was not at any time " belonging to, or registered in, the heretofore Province of " Lower Canada ; considering that the said Justices of the " Peace in the said declaration mentioned, at the time of " the making of the several orders for the payment of sea- " men's wages for alleged service on board the said steamer " in the said declaration set forth, had no jurisdiction, power, " or authority, to order or cause the amount of such wages, " and of the expences incurred by reason of the complaints " before them therefor, to be levied by distress upon the " said vessel or steamer, and the tackle and apparel of " the said vessel or steamer, and that the said orders were " absolutely null and void, as also the adjudication of the " said vessel or steamer and the said tackle and apparel " thereof to the said plaintiff, as set out in his declaration ; " considering that the said plaintiff hath not, nor ever had, " any legal right or title of property in or to the said vessel or " steamer, or the said tackle and apparel, by reason of the " said adjudication, distress and orders aforesaid, doth dis- " miss his action in this behalf, and doth annul and set " aside the attachment made in this cause, *without costs*."

CARTER, ED., for plaintiff.

ROSE and MONK, for defendant.

## SUPERIOR COURT.—MONTREAL.

Before :—DAY, Justice.

No. 2084. { GIGON..... *Plaintiff.*  
                   { vs.  
                   { HOTTE..... *Defendant.*

Held :—That an *exception à la forme*, setting forth that the defendant, described in the writ and declaration as *prêtre et curé* of the parish of *St. Jean-Baptiste*, instead of *St. Jean-Baptiste de Rouville*, the name by which the parish was erected, is insufficient, the description in the writ not being shewn to be erroneous and false.

Jugé :—Qu'une *exception à la forme*, alléguant que le défendeur, qui est désigné dans le writ et la déclaration comme *prêtre et curé* de la paroisse de *St. Jean Baptiste*, au lieu de *St. Jean-Baptiste de Rouville*, le nom sous lequel la paroisse a été érigée, est insuffisante, en autant que la désignation dans le writ n'est pas constatée être fautive et erronée.

Judgment rendered the 27th. February, 1858.

DAY, Justice :—In the writ and declaration in this cause, the defendant is described as “Messire Sévère Césaire “Hotte, prêtre et curé de la paroisse St. Jean-Baptiste, dans “le district de Montréal,” and an *Exception à la forme* is filed on the ground that the defendant does not reside in the parish of St. Jean-Baptiste, as alleged, but in the parish of St. Jean-Baptiste de Rouville. The return of the bailiff is, that he effected service of process at the domicile of the defendant, as described in the writ and declaration ; at *Enquête* admissions were given of the defendant's signature to various receipts, for *dîmes* and pew rent, all dated “St. Jean-Baptiste,” and that the defendant's residence was the same at the service of process as at the date of the receipts. The defendant produces the letters erecting the parish under the name given in the exception, as also the nomination of the defendant to the parish under the same name ; these documents and certain extracts from the register of proceedings of the parish of St. Jean-Baptiste de Rouville are admitted by the plaintiff as duly proved. I am of opinion that the exception is insufficient ; the designation given in the writ is not shewn to be false.

JUDGMENT :—“Considering that the defendant hath failed “to establish, under the *Exception à la forme*, that the de-

“ scription of the defendant, set forth in the writ and declaration in this cause filed, is erroneous and false, or that, by law, the defendant ought to be maintained in his said exception, and the conclusions thereof, doth dismiss the said exception, with costs.”

LEBLANC and CASSIDY, for plaintiff.

CARTIER, BERTHELOT et POMINVILLE, for defendant.

## VICE ADMIRALTY COURT.—LOWER CANADA.

Before :—The Honble. H. BLACK, Judge, Vice-Admiralty Court.

The **BRITISH TAR**.—*Charleson*.

*Action of SMITH.*

Where a seaman shipped for a voyage, “ from Shields to Barcelona, thence to any other port or ports in the Mediterranean, Black Sea, Sea of Azof, or any port or ports on the coast of Africa, West Indies, South America, United States, or British North America ;—from thence to a port of final discharge in the United Kingdom or Continent of Europe. The voyage to terminate in the United Kingdom and not to exceed ——— ;” and the ship went from Shields to Barcelona, and thence to Quebec to load for a final port of discharge in England :

Held :—1o. That no right of action accrued to such seaman for wages in Quebec, and that the Court had no jurisdiction in such action, under the provisions of the 17th. and 18th. Vic. c. 104, sec. 190,—the voyage, according to the contract, not terminating at Quebec.

2o. That it is not essentially necessary to insert the probable duration of the voyage in the mariner's contract.

Un matelot s'engagea pour un voyage, “ de Shields à Barcelone, et de là à aucun port ou ports dans la Méditerranée, la Mer Noire, la Mer d'Azof, ou aucun port ou ports du littoral d'Afrique, des Indes Occidentales, de l'Amérique du Sud, des Etats-Unis, ou de l'Amérique Britannique du Nord ;—et de ces derniers endroits à un port de décharge dans le Royaume-Uni ou sur le continent d'Europe. Le voyage se terminant dans le Royaume-Uni et n'excedant pas ———.” Le vaisseau se rendit de Shields à Barcelone, et de là à Québec, pour y prendre cargaison pour un port de décharge en Angleterre :

Jugé :— 1o. Que dans tel cas, tel matelot n'avait aucune action pour gages à Québec, et que la Cour n'avait aucune juridiction sous les dispositions des 17me. et 18me. Vict., chap. 104, sec. 190,—le voyage, aux termes du contrat, ne terminant pas à Québec.

2o. Qu'il n'est pas essentiellement nécessaire que la durée probable du voyage soit insérée dans l'engagement.

Judgment rendered the 6th. day of July, 1858.

In this case, John Smith, the mate of the brig “ **BRITISH TAR**,” instituted an action in the Police Court, against Charles Charleson, the master thereof, for the recovery of

his wages, for services performed as mate, on board the said vessel, on a voyage from Shields to Barcelona, and thence to Quebec.

The master pleaded, that by articles of agreement duly signed and executed in England, the complainant, Smith, had agreed to serve on board of the vessel on a voyage "*from Shields to Barcelona—thence to any other port or ports in the Mediterranean, Black Sea, Sea of Azof, or any port or ports on the coast of Africa, West Indies, South America, United States, or British North America ;—from thence to a port of final discharge in the United Kingdom, or Continent of Europe. The voyage to terminate in the United Kingdom and not to exceed — ;*" and, that the vessel had only proceeded from Shields to Barcelona, and thence to Quebec ; that the said voyage had consequently not yet terminated, and that Smith was therefore bound to fulfil his contract, and to remain by the vessel, and to return home in her, to a final port of discharge in the United Kingdom, and that she was now loading for her return trip direct thereto ; and that, consequently, he could not sue for, and was not entitled to the payment of his wages in Quebec, under the provisions of the 17th. and 18th. Vic., cap. 104, sec. 190.

The case came before J. MAGUIRE, Esquire, Inspector and Superintendent of Police, who referred it to the Court of Vice-Admiralty upon the ground that inasmuch as it presented a question of considerable importance to the interests of ship owners and seamen, it was desirable to have the decision of a higher tribunal, to establish the legality or illegality of the ship's articles.

It was contended for the mate, that the description of the voyage in the articles was too vague, and that by law the voyage in the mariner's contract ought to be clearly and explicitly expressed, so that the seaman might have some knowledge of the places to which he would be taken, but



that under this contract, the seaman could be taken to almost any part of the world, and to places of which the articles conveyed no idea whatever, as for instance,—the Coast of Africa, West Indies, South America, British North America, etc. ;—that the contract, in the present case, was therefore null and void ; that a decision to this effect had been, a short time past pronounced by A. STUART, Acting Judge, in the case of the “ PRINCE EDWARD,”—that moreover other provisions of the law had not been complied with in the articles,—that of inserting the probable duration of the voyage,—so that the master, in the present instance, could take the men nearly all over the world, and keep them on board for as many years as he chose ; that for this additional reason the articles were bad, and that the mate was no longer bound by the ship, and not bound to return home in her, and was consequently entitled to his wages.

On behalf of the master it was maintained, that the articles were perfectly good and valid, that the voyage was as explicitly described as it was possible for words to express, and that by the voyage as described in the articles, the seamen on board could not in the slightest degree be left in ignorance of the destination of the vessel ; that there was no vagueness whatever ; on the contrary, that there was a perfectly clear and straight course marked out for the vessel, proceeding, first from Shields, thence to Barcelona and up the Mediterranean to the Sea of Azof, thence on the return voyage along the coast of Africa bordering on the Mediterranean, and thence across the Atlantic to the West Indies or British North America ; that this was therefore, a perfectly clear and straight course, and could not be considered either vague or indefinite. That in pursuance of this clear and explicitly expressed agreement, the master had not taken the men to as many places as he might have done, but had, on the contrary, only taken them to Barcelona, and had thence come straight to Quebec, and was now

loading for a direct voyage home to a final port of discharge in the United Kingdom.

That this latitude of inserting a number of places in the contract or ship's articles ought to be permitted, and most liberally construed at all times, and more particularly so at the present period, considering the commercial depression that prevailed, and the consequent difficulty shipowners experienced in obtaining freight and employment for their vessels.

That as to the objection that the insertion of the probable duration of the voyage was not contained in the articles, it could not be maintained, as that portion of the law which prescribed that formality, was merely directory, and that the insertion of the probable length or duration of the voyage was not therefore essential, that the terms of the statute were, that the articles should contain the "nature, *and as far as practicable*, the probable duration of the "voyage," and that it was not therefore essential to state the probable duration of the voyage; that the mate was consequently bound to the ship, and to return home in her to a final port of discharge, and that therefore he could not sue or maintain an action for his wages in Quebec; and that this Court had no jurisdiction, and could not take cognizance of the promoter's complaint for wages.

The Honble. H. BLACK rendered judgment maintaining the articles, and remarked that there was a difference in the description of the voyage as contained in the present articles from that given in those of the "PRINCE EDWARD" to which he had been referred; that in that case the term "North America" was used, whereas in the present articles the destination of the vessel, on this continent, was limited to "British North America and the United States." He said he saw no difficulty in the case whatever, and considering the voyage which the vessel had actually performed, he was disposed to read the articles as if the voyage

was simply described thus,—from Shields to Barcelona, thence to Quebec, and back to a final port of discharge in the United Kingdom. That the other objection, as to the omission of the probable duration of the voyage, was not maintainable, inasmuch as the law merely required its insertion when practicable, and it was not therefore essential. He said that the master's protest must therefore be maintained, and that this Court had not jurisdiction and could not take cognizance of the present action, and that it must therefore be dismissed.

Action dismissed accordingly.

JONES and HEARN, for promoter.

POPE, RICHARD, for respondent.

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SUPERIOR COURT.—QUEBEC.

Before :—CHABOT, Justice.

No. 1187.	{	THE UNION BUILDING SOCIETY ..... <i>Plaintiff.</i>
		vs.
		RUSSELL ..... <i>Defendant.</i>
		and
		MORAN ..... <i>Opposant.</i>

Held :—1o. That a declaration filed in pursuance of the 12th. Vic., c. 57, sec. 1, which the parties signed, but to which they omitted to affix their seals, is nevertheless sufficient, and answers the object of the statute,—that of making known the names of the persons originally composing the society.

2o. That the legal existence of a corporation cannot be questioned by an incidental proceeding, such as a plea in a cause, but must be attacked by means of proceedings under the 12th. Vic., ch. 41.

Jugé :—1o. Qu'une déclaration filée en conformité à la 12me. Vic., ch. 57, sec. 1, signée des parties, mais à laquelle il n'a pas été apposé de sceau, est néanmoins suffisante, et répond à l'objet du statut,—qui est de faire connaître les noms des personnes qui ont d'abord composé la société.

2o. Que l'existence légale d'une corporation ne peut être révoquée en doute par une procédure incidente, telle qu'une exception, mais doit être attaquée au moyen d'une procédure en vertu de la 12me. Vic., ch. 41.

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Judgment rendered the 7th. day of May, 1858.

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This was a contestation by Moran to an opposition filed by the Union Building Society. The principal ground of contestation was, that the Union Building Society was not

a body corporate and politic duly constituted, inasmuch as the requirements of the 12th. Vic., ch. 57, sec. 1, had not been complied with. This section enacts: "That when  
 "and so soon as any twenty persons or upwards, in any  
 "part of Lower Canada, shall have agreed to constitute  
 "themselves a Building Society, and shall have signed and  
 "executed, under their respective hands and seals, a declaration of their wish and intention so to constitute  
 "themselves such Building Society, and shall have deposited the same with the Clerk or Prothonotary of the  
 "Court of Queen's Bench of the district wherein such  
 "Building Society is to be formed, and to have its principal office or place of business, (who, for receiving such  
 "deposit, shall be entitled to receive a fee of two shillings  
 "and six pence), such persons, and such other persons as  
 "may afterwards become members of such society and  
 "their several and respective heirs, executors, curators,  
 "administrators, successors and assigns shall be ordained,  
 "constituted, and declared to be, and shall be a corporation, body corporate and politic, by such name and style  
 "as a Building Society, as by such declaration, so deposited as aforesaid, shall have been declared to be the name  
 "by which the persons so executing the same desire such  
 "society to be known, etc., etc."

PARKIN, in favor of the contestation, maintained, that no declaration according to the terms of the above Act had been filed; that the Act in question required a declaration under the respective hands and seals of twenty persons, as a condition precedent to incorporation; whereas, in the present case, the twenty persons originally composing the Union Building Society had merely signed the declaration, but had not affixed their respective seals thereto, and that this omission on their part was fatal to their incorporation under the terms of the statute above mentioned, as well as under the general principles of law respecting seals (1).

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(1) *Blac. Book*, 2, cap. 20, p. 405 :—*Strange's Reports*, p. 764, (English Edition) :—*Espinasse on Evidence*, p. 214.

That where any act was performed in execution of a particular authority, as in the present case, the authority of a statute, all requirements and formalities imposed by such statute should be strictly complied with (1); that the French Law was equally explicit and stringent upon this point (2); that not only was it necessary that the seals should be affixed, but also proof of the sealing, where it actually exists, must be produced (3); that the declaration filed by the twenty persons originally composing the Union Building Society, not having been made in conformity with the requirements of the above statute, the society in question was not a body corporate and politic duly constituted, and could not therefore plead or be impleaded in any Court of Justice, and that the opposition filed by them in the present cause, must consequently be dismissed.

ANGERS, *contrà* :—La question à décider est de savoir si la formalité omise, l'apposition du sceau, est purement une condition accidentelle, ou si elle est de l'essence du contrat. Il faut distinguer les formalités qui sont purement accessoires de celles sans lesquelles le contrat ne peut exister. Il faut aussi examiner si la loi a prononcé la peine de nullité, ou si la disposition est simplement directrice. La prétention de la société est que la formalité omise n'est pas de l'essence du contrat, n'est jamais requise à peine de nullité dans notre droit, et n'est qu'accidentelle et secondaire. Les autorités suivantes établissent cette proposition. Dans Dalloz, Jurisprudence Générale, vol. de 1841, page 260, l'on trouve un arrêt du 9 juin 1841, par lequel il a été jugé que des informalités dans la formation d'une association ne peuvent être invoquées, ni par les associés ni par des tiers, si l'association s'est constituée et a procédé publiquement à transiger des affaires. Dans Sugden on Powers, p. 301 de l'Ed. anglaise, l'on trouve une autorité qui établit que, même en Angleterre, où le sceau est quelquefois nécessaire

(1) 1 Phillips on Evidence, pp. 448, 450 :—1 Starkie on Evidence, p. 321.

(2) Répertoire, vbo. Nullité, sec. 1, p. 249.

(3) Harrison's Digest, vbo. Deed.

pour la validité de certain contrats, on presumera qu'il a été apposé, quand bien même il n'apparaît pas, et qu'il suffit de toucher le papier avec la plume ou autrement, quoi qu'il ne reste pas d'empreinte ; à moins de preuve du contraire, preuve que n'a pas été produite dans le cas actuel. Dans une cause jugée à Québec, il a été décidé que l'absence du sceau à un règlement d'une corporation municipale, lorsque le statut requierait tel sceau, n'emporte pas la peine de nullité, il y a une décision analogue rapportée au vol. 7, page 139, des Déc. B. C., Cummings et Quintal, no. 4 du sommaire. Dans Dwarries on Statutes, on trouve la même doctrine quant aux formalités qui sont purement directrices, et celles qui sont ou impératives ou prohibitives, et qui doivent être suivies à peine de nullité. La règle générale est qu'il n'y a point de formalité dont l'omission emporte la peine de nullité, à moins que la nullité ne soit prononcée par le statut, ou à moins que la formalité ne soit de l'essence même du contrat, ou, quelques fois encore, lorsque la loi est prohibitive. Cette question est surtout traitée avec clarté et précision par Solon dans son *Traité des Nullités*. Il tient que les nullités doivent être prononcées par la loi, et ne peuvent jamais être suppléées par le juge. (1)

On trouve les mêmes principes dans Touillier, vol. 7, no. 480 à 485. Dans la cause de Lambert et Gauvreau, (2) il a été jugé que l'omission d'une foule de formalités secondaires ou accidentelles dans un testament n'emportait pas la peine de nullité.

La société soutient encore que son existence ne peut être mise en question au moyen d'une exception et par une procédure incidente, et que cela ne peut se faire que par l'action directe donnée par le statut de la 12<sup>me</sup> Vict., ch. 41, sec. 8.

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(1) Solon, des Nullités, vol. 1, No. 325 et seq.

(2) 7 Déc. des Tribunaux B. C. p. 277.

CHABOT, Juge.—La contestation en cette cause élève la question de la légalité de l'existence de la société connue sous le nom de "*Union Building Society*," opposante afin de conserver en cette cause. Il est prétendu que la dite opposante ne s'est pas conformée aux provisions du statut qui règle la formation des sociétés de bâtisse, qui prescrivent l'enfilure au bureau du prothonotaire d'une déclaration signée par les personnes qui voudraient se former en société de bâtisse et scellée de leurs sceaux; en autant que les personnes qui composaient originairement "*The Union Building Society*" ont signé la déclaration seulement, et n'y ont pas attaché leurs sceaux; et que cette omission est fatale à l'existence de la dite société.

Il y a un nombre d'autorités des deux côtés; mais je crois que la majorité va à établir que ces vieilles formalités ne sont pas essentielles, et, plus même, qu'il y a un nombre d'actes qui sont défendus par statut, lesquels quand ils sont faits, sont néanmoins regardés comme valides. Il y a plusieurs autorités sur ce sujet, mais je me contenterai de référer à l'une de ces autorités qui, je crois, comprend tout ce que l'on peut dire à ce sujet, et qui commente sur les observations des autres autorités, pour et contre les prétentions que la formalité en question est essentielle à la validité de l'acte. Je réfère à Solon, "*Traité des Nullités*." Il fait une distinction entre les actes essentiels et les actes accidentels, et dit que la question de savoir si l'acte est essentiel ou accidentel est déferée à la discrétion de la Cour; et que dans les cas où le législateur n'a point prononcé expressément la nullité d'un acte pour cause de contravention à une loi, il y a doute; au numéro 325, il dit:—"Telles sont les observations que nous avons cru utiles, pour prouver le peu de justesse de deux propositions adoptées par M. Merlin et M. Toullier. La science profonde de ces deux jurisconsultes, a dû nous faire hésiter à les combattre. Aussi, n'est-ce qu'après un examen approfondi, que nous avons persisté dans nos premières idées, et que nous

“avons acquis la conviction de l'erreur dans laquelle ils  
“étaient tombés.

“La même étude nous a également convaincu que toutes  
“les fois que le législateur n'a point prononcé expresse-  
“ment la nullité d'un acte, pour cause de contravention à  
“une loi, il y a doute ; que quelques soient les expressions  
“dont il s'est servi, les juges doivent toujours rechercher  
“quelle a été sa volonté, ce qu'ils ne peuvent et ne doivent  
“faire qu'en observant les indices généraux et ordinaires  
“que l'on est dans l'habitude de reconnaître en pareille ma-  
“tière, (1) que se déterminer seulement par les expressions  
“dont il s'est servi, en les éloignant de leur signification  
“propre, c'est de toutes les interprétations la plus arbitraire,  
“et par cela même, la plus contraire à l'esprit général de la  
“législation et à l'ordre public.

Aux numéros 326 et 327, il dit :—

“Après avoir ainsi combattu les diverses opinions qui se  
“sont formées sur la manière d'interpréter les lois en matière  
“de nullité, nous devons faire connaître les règles que la  
“raison, la loi, et la jurisprudence, nous indiquent comme  
“les plus incontestables et les plus sûres.”

“Une première règle qu'on doit considérer comme fonda-  
“mentale, c'est que lorsque la loi prononce la nullité d'un  
“acte, le juge ne peut se dispenser de la prononcer : il ne lui  
“appartient pas de la modifier ou de la restreindre par  
“quelque considération que ce puisse être.—“Le juge, di-  
“sait l'immortel auteur de l'esprit des lois, n'est que la  
“bouche qui prononce la parole de la loi,—un être inanimé  
“qui ne peut en modérer ni la force ni la rigueur.”

Et aux numéros 330, 331 et 332, il dit :—

“Une deuxième règle qu'on peut aussi regarder comme  
“fondamentale, c'est que les nullités étant une véritable

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(1) Burlamaqui, loc. cit. page 546, et suiv.



“ peine, sont de droit étroit, et que le juge ne peut en reconnaître d'autres que celles que le législateur a lui même reconnues. L'art. 1030, du code de procédure, porte expressément ;—aucun exploit ni acte de procédure ne pourra être déclaré nul, si la nullité n'en est pas formellement prononcée par la loi. ”

“ Cette disposition particulière aux actes de procédure, a été étendue par la jurisprudence aux autres matières de droit ; circulaire du ministre de la justice au commissaire du Gouvernement, près la cour de cassation du 10 prairial an XI.—Arrêt de la cour de cassation, en date du 5 janvier 1810, rendu par les sections réunies, sous la présidence du grand juge, et sur les conclusions du procureur général Merlin.

“ La nouvelle jurisprudence n'a fait, à cet égard, que confirmer l'ancienne ; voici, en effet, ce que l'on lit dans Mornac, sur la loi 1<sup>re</sup>. de procurat et defens. “ *Valere nihil hominùs acta quælibet in quibus peccatum in aliquo fuerit adversùs edicta regia, si verò adjectum non sit ratum alias non fore quod geritur, ut aut vulgò loquimur : s'il n'est dit, sous peine de nullité.* ”

“ Enfin, une troisième qui fait le complément des deux précédentes, et sans lesquelles il serait souvent impossible d'en faire l'application, c'est qu'il n'est pas nécessaire pour qu'un acte soit annulé, que la nullité soit formellement prononcée ; il suffit que la volonté du législateur ne puisse pas être révoquée en doute. C'est la conséquence du principe, que la loi défend non seulement ce qui est compris dans ses termes, mais encore ce qui est compris dans son esprit. “ *Lex imperat et vetat non solum quod verbis sed et quod sententiâ continetur.* ”

A la section 5<sup>me</sup>., No. 333, il dit :

“ Les conséquences qui résulteraient du maintien de l'acte ou de son annulation ; dans le doute, il faut toujours

“prendre le parti le plus juste : “ *Omnis enim interpretatio fondari debet in æquo et bono, et debet habere istos comites, scilicet, bonum et æquum.* ”—Dumoulin, Cont. de Paris, sec. 37, glose 1<sup>ère</sup>., No. 48.

Au No. 352 :

“ Toutes les injonctions, les défenses, formalités, ou conditions, qui tiennent à la substance d'un acte ou d'une convention, sont faites ou prescrites, à peine de nullité, bien que le législateur n'ait point formellement prononcé cette peine. “ *Certum enim est corruere actum ex defectu formæ substantialis et statutoriaë, leg. cum hi., 1o., § si prælors de transact.* ”

“ Au contraire, si l'injonction, la défense, la formalité, ou la condition, ne sont, de leur nature, qu'accidentelles, leur inobservation n'est une cause de nullité, qu'autant que le législateur s'est prononcé à cet égard. ”

Au No. 354, il dit :

“ Les formalités ou conditions accidentelles sont celles qui ne sont prescrites que pour rendre l'acte plus sûr et plus authentique. Ces formalités et conditions sont exigées pour que cet acte parvienne plus exactement au but que le législateur s'était proposé, et leur omission n'empêche cependant pas que la volonté de ce dernier ne soit suivie : “ *accidentia non mutare propriam rei formam plus quàm manifestum est.*—*Julius Clarus, liber 4., § testamentum quæst., 8, No. 17, addit.* ”

Et au numéro 355 :

“ L'acte produit en justice a-t-il rempli son objet, malgré l'omission qu'il renferme ? cet acte offre-t-il toutes les garanties que le législateur avait voulu qu'il assurât, lorsqu'il avait déterminé sa forme ? ”

Et au numéro 414, il dit :

“ On pensait autrefois que la maxime qu’il n’est point  
 “ de nullité sans griefs ne pouvait être opposée à celui qui,  
 “ bien qu’il n’en eût point ressenti un préjudice particulier,  
 “ proposait une nullité prononcée dans l’intérêt public : on  
 “ disait qu’en cette matière, le demandeur en nullité avait  
 “ toujours un intérêt suffisant comme membre de la société,  
 “ à faire annuler un acte immoral, illicite, dont l’existence  
 “ tendrait à compromettre la tranquillité de cette société  
 “ elle-même.”—Dunod, des Prescriptions, part. 1er., ch. 8.

“ Cette opinion était juste sous la législation romaine,  
 “ parce qu’alors on ne connaissait pas l’institution d’un  
 “ corps de magistrature, chargée d’exercer les actions qui  
 “ se rapportent à l’ordre public ; chaque citoyen avait le  
 “ droit d’intenter les actions de ce genre,—actions que par  
 “ ce motif la loi appelait : *populaires* (1). Aujourd’hui, de  
 “ même que sous l’ancienne jurisprudence française, il ne  
 “ peut en être ainsi : les actions populaires n’existent  
 “ plus (2). Nous avons des magistrats spécialement char-  
 “ gés de faire respecter les lois et de veiller à la conserva-  
 “ tion de l’ordre public ; dépositaires des plaintes des ci-  
 “ toyens, ce n’est que par leur organe que ceux-ci peuvent  
 “ dénoncer à la justice l’existence d’un acte contraire au  
 “ bon ordre ; si ces derniers s’adressaient directement aux  
 “ tribunaux, pour demander la nullité d’un pareil acte, ils  
 “ devraient être repoussés par cela seul que la contraven-  
 “ tion à la loi ne leur a apporté aucun préjudice, et qu’ils  
 “ ne peuvent pas proposer une nullité sans grief. L’intérêt  
 “ de la société exige qu’on prévienne ces actions odieuses,  
 “ qui, sous le prétexte du bien public, ne seraient que l’effet  
 “ de la méchanceté et de la haine, et qui se multiplieraient  
 “ en raison de la grande facilité qu’il y aurait à les pro-  
 “ poser.

Et au numéro 415, il ajoute :

(1) Leg. 2, sec. 3, de popul. act.

(2) Serres, aux Inst. p. 378.

“ Enfin, on ne doit pas perdre de vue, que la règle, *qu’il n’est point de nullité sans grief*, n’est qu’une règle d’interprétation, et qu’il n’est possible de l’appliquer que dans les cas où la volonté du législateur peut être douteuse. Si la loi est claire, précise, exempte d’équivoque, le juge ne peut se dispenser de prononcer la nullité, il n’a point à rechercher le plus ou moins d’intérêt que les parties ont à proposer, *suprà*. 327. Seulement dans ce cas, la maxime ci-dessus doit faire accueillir les équipollents et les inductions, *suprà* 361 et 366. ”

Maintenant, la question qui s’élève est de savoir si l’objet que le législateur avait en vue, a été rencontré par la déclaration qui a été filée sans l’apposition des sceaux. Je crois que oui, parce que le sceau n’est rien en lui-même, et les signatures des vingt personnes à la déclaration qui a été filée au bureau du Prothonotaire offre toutes les garanties requises par le statut ; et je crois que cette déclaration est suffisante, suivant les observations de Solon suscitées.

Il y a une autre raison pour laquelle la Cour est d’opinion que le présent contestant ne peut maintenir sa contestation ; c’est qu’il y a un certain mode par lequel l’existence de toute société incorporée peut être attaquée—c’est une poursuite directe. En effet, s’il était permis à tout individu, en aucun temps, d’attaquer l’existence d’une société incorporée, les banques, et toutes autres sociétés, ne pourraient porter d’action, parce que leur existence serait, à tout instant, mise en question ; le moyen qu’on doit prendre pour attaquer l’existence d’une corporation est établi par la statut de la 12<sup>me</sup>. Vic., et est aussi indiqué dans “ *Angell and Ames on Corporations*, page 664, *Edition of 1853*. ” Je n’ai pu trouver qu’une cause plaidée devant le Juge-en-Chef Sewell, dans laquelle on a attaqué l’existence d’une fabrique, en alléguant que la paroisse n’avait jamais été érigée civilement. C’était avant le statut de 1849, qui pourvoit à l’érection civile des paroisses ; néanmoins, il fut maintenu que l’existence de la

fabrique ayant été reconnue pendant nombre d'années par le gouvernement et par le peuple, ne pouvait être attaquée indirectement.

Contestation dismissed.

PARKIN, J. B., for MORAN.

LELIEVRE and ANGERS, for Building Society.

COUR DE CIRCUIT.—QUEBEC.

Présent :—CHABOT, Juge.

No. 1957.	{	BERNIER,.....	<i>Demandeur.</i>
		vs.	
		VACHON, <i>et al.</i> ,.....	<i>Défendeurs.</i>
		et	
		BOUCHER,.....	<i>Tiers-Saisi.</i>

Jugé :—Que pour faire annuler un transport comme entaché de fraude, il faut alléguer et prouver l'insolvabilité du cedant.

Held :—That in order to set aside a deed of assignment on the ground of fraud, the insolvency of the assignor must be alleged and proved.

Jugement rendu le 30 juin, 1858.

En cette cause, un writ de saisie-arrêt, après jugement, fut émané pour saisir les effets des défendeurs entre les mains du tiers-saisi. Le tiers-saisi fit une déclaration alléguant qu'un transport lui avait été signifié avant le service sur lui du writ de saisie-arrêt en la cause, et il produisit avec sa déclaration une copie du transport, et de la signification d'icelui ; par ce transport, passé devant notaires, quelque temps avant le service du writ de saisie-arrêt sur le tiers-saisi, un des défendeurs avait cédé et transporté à sa mère la dette qui lui était due par le tiers-saisi.

Le demandeur attaqua ce transport alléguant, qu'il était frauduleux, et qu'il avait été fait pour frauder le demandeur. De la part des défendeurs il fut argué qu'il n'y avait pas de preuve que le transport fût frauduleux, et que la fraude ne pouvait pas se présumer.

CHABOT, Juge.—En cette cause une question d'importance s'élève; celle de savoir ce qu'il est nécessaire de prouver pour mettre de côté ou annuler un transport comme frauduleux. De la part du demandeur il a été maintenu que le transport de la part de l'enfant à sa mère avait été fait dans le but de frauder le demandeur, mais le demandeur n'a pas prouvé, et n'a pas même allégué déconfiture de la part des défendeurs; ce qui était nécessaire pour faire annuler le transport comme frauduleux. (1) Denisart discute la doctrine maintenue par beaucoup d'autres auteurs sur ce sujet, et il démontre clairement, qu'il est nécessaire de prouver la déconfiture du défendeur pour faire mettre de côté un transport fait par lui. Le demandeur en cette cause n'ayant pas prouvé, ni même allégué, déconfiture de la part des défendeurs, la saisie-arrêt ne peut pas être maintenue.

RHÉAUME, pour le demandeur.

LÉGARÉ et MALOUIN, pour les défendeurs.

### COUR DE CIRCUIT.—QUEBEC.

Présent :—CHABOT, Juge.

No. 1480.	{	LECLERC,.....	<i>Demandeur.</i>
		vs.	
		CARON,.....	<i>Défendeur.</i>
		et	
		LEMOINE,.....	<i>Tiers-Saisi.</i>

Jugé :—Qu'une somme d'argent payable par l'Inspecteur du Revenu pour services rendu comme dénonciateur, sous l'Acte de la 14<sup>me</sup> et 15<sup>me</sup> Vic, chap. 100, est insaisissable.

Held :—That monies payable by the Revenue Inspector for services performed as an informer, under the statute 14th and 15th Vict. cap. 100, are not liable to seizure.

Jugement rendu le 30 juin, 1858.

Le tiers-saisi en cette cause fit une déclaration qu'il devait, en sa qualité d'Inspecteur du Revenu pour le district de Québec, une certaine somme au défendeur, pour services rendus comme dénonciateur sous les provisions de l'Acte 14<sup>me</sup>. et 15<sup>me</sup>. Vic. cap. 100.

(1) Nouveau Denisart, vbo. Fraude.

CHABOT, Juge.—La Cour est d'opinion que la saisie-arrêt en cette cause ne peut pas être maintenue, parce que l'argent qui est dû au défendeur par le tiers-saisi, lui est payable dans l'intérêt public, et pour des services rendus pour le bien public, en vertu du statut ci-haut mentionné.

Saisie-Arrêt annulée.

RHÉAUME, pour le demandeur.

LAPOINTE, pour le défendeur.

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QUEEN'S BENCH, } DISTRICT OF QUEBEC.  
APPEAL SIDE. }

Before :—Sir L. H. LaFontaine, Baronet, Chief Justice,  
AYLWIN, DUVAL and CARON, Justices.

FRASER *et al.* ..... *Appellants.*

and

ROCHE ..... *Respondent.*

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Held :—1o. That a paid warehouseman (*dépositaire salarié*) is liable for want of due care respecting goods placed in his store.

2o. That if such warehouseman plead that his store was broken into, and the goods so confided to his charge, as such *dépositaire*, were stolen and taken away therefrom, the *onus* of proof rests with him, and he must prove the robbery.

3o. That a written order by the seller of goods, directing those in whose care the goods are, to deliver the same to the buyer, amounts, in law, to a good and valid delivery of such goods.

Jugé :—1o. Qu'un dépositaire salarié de marchandises confiées à sa garde, est responsable de la faute légère.

2o. Que si tel dépositaire plaide que son magasin a été enfoncé, et que les marchandises ainsi confiées à sa garde comme tel dépositaire, en ont été volées et emportées, l'*onus probandi* incombera sur lui, et il sera tenu de prouver le vol.

3o. Qu'un ordre écrit par le vendeur de marchandises, enjoignant au dépositaire d'icelles d'en faire la livraison à l'acheteur, est, en loi, une livraison bonne et valable de telles marchandises.

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Judgment rendered the 12th. June, 1858.

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This was an appeal from a judgment rendered in the Superior Court, in an action of revendication instituted by the respondent, plaintiff in the Court below, against the appellants, defendants in the cause, for the recovery of a certain quantity of copper and yellow metal placed for safe keeping in the stores of the appellants, who were warehousemen, by two persons named Bélanger, repre-

sented by the respondent who purchased the effects from them the same day that they so placed the same in the store of the appellants, and from whom he obtained the following delivery order, addressed to the appellants and accepted by them :

QUEBEC, 5th. October, 1854.

Messrs. FRASER & WYATT,

Please deliver to the order of Mr. John Roche all the copper and yellow metal deposited in your store by us, amounting to about seven thousand, three hundred and ninety one pounds, or thereabouts.

(Signed) ANTOINE A. BÉLANGER,  
L. BÉLANGER.

Accepted,

(Signed) FRASER, WYATT & Co.

The appellants pleaded in the Court below, that if at any time the quantity of copper and metal claimed by the plaintiff, over and above what had been seized, had been deposited in their store, it had been stolen therefrom, as their store had been broken into ; and that they had used all due care, diligence and watchfulness, with respect to the said copper and metal during the whole time the same remained in their store ; that the robbery in question was a matter beyond their control, for which they were not liable, and could not therefore be made answerable for the loss occasioned thereby.

The evidence established that about 2000 or 2700 lbs. of copper, and 4436 lbs. of yellow metal had been placed in the defendants' store ; that they had used due care and diligence respecting the safe keeping of the said copper and yellow metal ; but that their store had been broken into, and that from appearances, goods had been stolen therefrom, and among other things a portion of the copper and metal in



question ; that they informed the chief of police of the circumstance of the robbery.

The judgment of the Court below condemned the defendants in the sum of £56 1 0, being the value of the copper and metal placed in their warehouse, over and above the quantity seized and recovered by the plaintiff. (1)

From this judgment the present appeal was instituted.

For the appellants it was contended, that they were exempt from the liability imposed upon them by this judgment ; that in order to appreciate rightly the extent of the liability of warehousemen, the object of which they had the custody ought not to be lost sight of, as negligence was relative, and ought to be decided according to the value of the article to be cared for, and the degree of care called for. That the copper and yellow metal in question, was old sheathing stripped from the wreck of the *Clutha*, as the evidence established, and that it was kept by the appellants in the accustomed manner, by placing it in a heap in their store, where goods of their own and of other persons were likewise kept, and that they bestowed upon it the utmost care ; that during the day their storeman kept watch over the store and at night their store was securely locked and fastened ; that notwithstanding all these precautions, a portion of the metal disappeared, and that the evidence established that it had been stolen ; that it was further proved that the loss had not been occasioned by the negligence or want of proper care of the appellants ; that the respondent had never charged the appellants with negligence, nor had he attempted to prove that there was any default on their part. That under these circumstances, and the appellants having proved that they took all reasonable care, and exercised more than ordinary diligence in respect of the copper and metal in question, they were not liable to in-

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(1) A full Report of this case in the Court below will be found in the 7 L. C. R. p. 472.

demnify the respondent for the deficiency. That the liability of a warehouseman was not that of an insurer, yet, that the Court below with full evidence that there was no negligence on the part of the appellants had held them liable. That some reliance had been placed on the fact that no notice of the loss had been given to the respondent, but that there was no law requiring any such notice to be given, and that without positive authority that a liability once discharged could be reimposed, the appellants would except to the rule laid down by the judgment rendered in the court below. That thus far the appellants had assumed that a contract existed between them and the respondent, but no contract was stated or proved, and that without such contract the respondent could have no claim against the appellants, for that whatever might have been the rights of the two persons named Bélanger as depositors, the respondent did not stand in their stead as regarded the bailment.

On behalf of the respondent it was maintained that the appellants were liable according to the tenor and effect of the judgment of the Court below ; that the appellants, as paid warehousemen, had undertaken the charge and safe keeping of the copper and yellow metal deposited with them for this purpose by the two persons named Bélanger, who had, on the same day, the 5th October, sold it to the respondent ; that the respondent was, and always had been, ready and willing to pay the appellants their charges for the storage and safe keeping of the copper and metal in question, so soon as they would enable him to get possession of it, but that on the contrary they declined and refused to deliver the whole, but would only deliver a portion thereof, some 1700 lbs. of copper less than the Bélangers had delivered and deposited in their store, and which he had purchased from them ; that as paid warehousemen, the appellants, were responsible for the safe keeping of the goods so placed under their care, and consequently were liable to the respondent for the full amount and value of the metal and copper, so deposited with them for storage and safe keeping.

Sir L. H. LAFONTAINE, Bart. C. J.—Recited the facts of case, and remarked, that the appellants, carrying on the business of warehousemen, were entitled to, and could exact payment for their services and storage, and that they were therefore bound to use due care and diligence respecting the safe keeping of the goods entrusted to their charge, that they had not clearly proved that the missing copper claimed in the present case, was stolen; and that the judgment of the Court below must therefore be confirmed.

DUVAL, Justice.—A question of law has been raised by the appellants in this cause, to the effect that the respondent had no right of action against the appellants, inasmuch as he had no property in the metal sued for, that the Bélangers had made no delivery of the copper and metal to him, and that consequently, they, the Bélangers, were the only parties who could maintain an action against the appellants for the recovery thereof; but we are of a contrary opinion, there was a delivery order given by the Bélangers to the present respondent, and this is a good and valid delivery in law, and has been so held in innumerable instances in England and in France. (1) A number of other authorities might be cited on this point, but it is unnecessary to refer to them, as the question has been well settled, and there is no difference of opinion among authors now upon the subject

Judgment confirmed.

STUART and VANNOVUS, for appellants.

JONES and HEARN, for respondents.

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(1) *Troplong, vo. Privilege 344*:—*Smith's Mercantile law*, pp. 489, 503 and following pages.

## VICE ADMIRALTY COURT.—LOWER CANADA.

Before:—STUART, ANDREW.—Asst.—Judge.

The PRINCE EDWARD.—*Diaper*,*Action of LE CRAS.*

Where a seaman shipped for a "voyage from London to Sunderland, thence to Rio Janeiro and any ports in South or North America. West Indies, Cape of Good Hope, Indian or China seas, Australasia and back to a final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest, voyage not to exceed twelve months," and the ship went from London to Sunderland, thence to Rio-Janeiro, thence to the Cape of Good Hope, thence to St. Helena and the Island of Ascension, and thence to Quebec:—

Dans le cas où un matelot s'était engagé pour un "voyage de Londres à Sunderland, de là à Rio-Janeiro et aucuns ports dans l'Amérique du Sud ou de l'Amérique du Nord, des Indes Occidentales, des mers de l'Inde ou de la Chine, de l'Australasie et de retour à un port de décharge dans le Royaume Uni ou sur le continent d'Europe, entre l'Elbe et Brest, le voyage ne devant pas durer plus de douze mois," et le vaisseau s'étant rendu de Londres à Sunderland, de là à Rio-Janeiro, de cet endroit au Cap de Bonne Espérance, de là à St. Hélène et à l'Isle d'Ascension et de ce dernier endroit à Québec:—

Held:—1o That the articles were bad as being vague and uncertain;

Jugé:—1o Que le contrat étant vague et incertain était nul.

2o. That the voyage actually performed by the vessel in proceeding from the Cape of Good Hope across the Atlantic to the Island of Ascension, whence, instead of returning to a final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest, she recrossed the Atlantic and returned to the continent of America, was not a prosecution of the voyage described in the articles, and amounted, in effect, to a deviation, under the merchant shipping act of 1854, sec. 190. (1)

2o. Que le voyage fait par le vaisseau en traversant l'Atlantique du Cap de Bonne Espérance à l'Isle d'Ascension, d'où il avait traversé l'Atlantique de nouveau et était revenu au continent d'Amérique au lieu de retourner à un port de décharge dans le Royaume-Uni ou sur le continent d'Europe, entre l'Elbe et Brest, n'était pas poursuivre le voyage indiqué dans le contrat, mais était, de fait, une déviation de ce voyage, aux termes de l'acte de la marine marchande de 1854, sec. 190.

Judgment rendered the 25th. June, 1858.

This was an action instituted by the promoter, carpenter on board of the vessel called the "Prince Edward," for the recovery of his wages. The case turned entirely upon the question as to whether the promoter was entitled to sue for his wages in Quebec, under the provisions of the Merchant shipping act of 1854, 17th. and 18th. Vict., ch. 104, sec. 190, on the ground that the voyage for which he engaged had terminated, in consequence of the ship having abandoned or deviated from the voyage mentioned in the articles of

(1) Supra, The British Tar.—Charleson p. 272.

agreement, and also upon the ground that the articles were bad on account of the vagueness of the description of the voyage contained in them. A question of unseaworthiness was also raised but the judgment turned upon the two first points. The articles were dated the 25th June 1857, and the voyage was thus described,—“*on a voyage from London to Sunderland thence to Rio-Janeiro and any ports in South or North America, West Indies, Cape of Good Hope, Indian or China seas, Australasia, and back to a final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest, voyage not to exceed twelve months.*” The ship went from London to Sunderland, thence to Rio-Janeiro, thence to the Cape of Good Hope, thence to St. Helena, thence to the Island of Ascension, and thence to Quebec, where she was loading for a final port of discharge in the United Kingdom.

STUART, *Assistant-Judge*.—The voyage as described in the articles is uncertain and vague, under that voyage the seaman could be taken all round the world, and to places and regions of which the articles conveyed no idea whatever; by the 190th. section of the merchant shipping act of 1854, it is provided that, “the nature, and, as far as practicable, the duration of the intended voyage or engagement shall be inserted in the shipping articles; the term “voyage” imports a definite idea, and seamen, therefore, should be able to know, from the description of the voyage in the shipping articles, where it is likely they will be taken to; from the description of the voyage given in the present articles, the seamen could form no idea of the places they might be taken to, and the articles are therefore void. The voyage actually performed by the vessel in proceeding from the Cape of Good Hope across the Atlantic to the Island of Ascension, whence, instead of returning to a final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest, she recrossed the Atlantic and returned to the continent of America, is not a prosecution of the voyage given

in the articles ; the voyage performed by the vessel is different from that described in the articles, and amounts, in effect, to a deviation ; by reversing the order of the voyage or places described in the articles it constituted a different voyage ; this principle has been laid down as law in a case to be found in a volume of American admiralty reports ; the promoter is consequently entitled to his wages at this port, and the protest of the master by which his right to recover has been contested must be overruled.

SECRETAN for promoter,

JONES and HEARN for master.

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SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 400. { GLOUTENEY..... *Plaintiff*.  
vs.  
{ LUSSIER *et al*..... *Defendant*.

Held:—In an action brought against the representatives of a party deceased, within a year of his death, by the plaintiff, for eleven years wages, as *menagère et gouvernante*, accrued up to the time of the death; that the prescription under the 127th. article of the custom of Paris, even if the article were in force, is not applicable.

Jugé :—Dans une action portée contre les représentants d'une personne décédée, dans l'an et jour du décès, pour onze années de gages échues à l'époque du décès de telle personne, réclamées par la demanderesse, comme *menagère et gouvernante*; que la prescription établie par l'article 127<sup>me</sup>. de la coutume de Paris, en supposant même que cette article fût en force, ne pourrait être invoquée.

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Judgment rendered the 27th March, 1856.

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SMITH, Justice.—This action was brought in September, 1857, by the plaintiff, an unmarried woman, against the defendants, as representatives of one Louis Lussier, to recover £275 for eleven years wages, *salairé en qualité de menagère et gouvernante*, due up to the time of Lussier's death, which took place on the 15th November, 1856. The defendants plead that the plaintiff is *non-recevable*, and invoke the prescription against her as a servant for the time previous to 18th November, 1856, and offer their oath that they owe the

plaintiff nothing. To this plea the plaintiff demurs. (1) At the argument the defendants rested on the 127th article of the *coutume de Paris* which is in these terms:—" Drappiers, " merciers, épiciers, orfèvres, et autres marchands gros- " siers, maçons, charpentiers, couvreurs, barbiers, servi- " teurs, laboureurs, et autres mercenaires, ne peuvent faire " action ni demande de leur marchandise, salaire et services " après un an passé, a compter du jour de la délivrance de " leur marchandise, ou vacation, s'il n'y a cédule, obli- " gation, arrêté de compte par écrit, ou interpellation judi- " ciaire."

But to this it was answered that the action in question was brought within the year after the service ceased.

The service in this case was not that of a servant in the sense used in the article, but, as alleged in the declaration, was that of a manager and superintendant, and was continued until the death of Lussier. The action is brought within a year from his death, and I think the article, if it be now in force, does not apply.

Judgment.—" Considering that the defendants have failed " to establish by law, the existence of any prescription such

(1) The plea is as follows:—" Les défendeurs, pour fin de non-recevoir l'action, et " sans admettre les allégués de la demande, disent que la demanderesse est non re- " cevable a réclamer son salaire pour les années écoulées avant le 17 novembre, " 1856, et les défendeurs sont bien fondés a invoquer la prescription contre la récla- " mation qu'elle fait pour salaire comme servante pour la période de temps avant le " 15 novembre, 1856."

" Pourquoi, les défendeurs, offrant d'affirmer qu'ils ne doivent rien, concluent a être " déchargés de la demande, pour tout ce qui est demandé pour salaire avant le 15 " novembre, 1856, et au renvoi de l'action avec dépens."

Answer to plea.—" La demanderesse, pour réponse en droit au premier plaidoyer des défendeurs, allègue et dit que les allégués des défendeurs, contenus dans le dit plaidoyer, sont insuffisants en droit.

10. " Parce que l'action de la demanderesse a été intentée dans l'an de la sortie du service du dit Louis Lussier, et que pour ce la prescription d'un an n'est plus appli- cable.

20. " Qu'il n'y a pas de prescription absolue autre que celle de trente ans contre l'action des serviteurs intentée sous les circonstances qui distinguent la présente demande.

30. " Que la prescription qui peut valablement être opposée contre l'action de la demanderesse, en tant qu'elle demande onze années de salaire, doit être déterminée par les circonstances et la preuve qui pourra être faite par les parties.

40. " Que l'offre du serment par les défendeurs ne peut leur servir, vu qu'ils sont héritiers du dit Louis Lussier, et n'ont eu aucune connaissance personnelle des faits allégués dans la déclaration.

50. " Parce que l'offre du serment, même si elle eut été faite par Louis Lussier lui-même, aurait dû être accompagnée de la déclaration qu'il a tenu des livres."

"as set up by the *fin de non-recevoir*, in their *défense* to the present action, doth maintain the *défense en droit* filed by the said plaintiff, and doth dismiss the said exception "with costs."

LAFLAMME, LAFLAMME and BARNARD, for plaintiff.

SICOTTE and CHAGNON, for defendant.

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SUPERIOR COURT.—MONTREAL.

Before :—DAY, Justice.

No. 1825. { BERNIER ..... *Plaintiff*.  
                  { vs.  
                  { BELLIVEAU ..... *Defendant*.

Held:—That in an action for infringement of Letters Patent for an Invention, it is sufficient to set out in the declaration the granting of the Letters Patent in favour of plaintiff, setting out also the date and tenor thereof, without alleging compliance with the formalities pointed out by the statute to entitle the plaintiff to obtain the Letters Patent.

Jugé:—Que dans une action pour infraction du droit résultant de Lettres Patentes, il est suffisant d'alléguer dans la déclaration, l'oc roi des Lettres Patentes au profit du demandeur, ainsi que leur date et la teneur d'icelles, sans qu'il soit besoin d'alléguer que le demandeur s'est conformé aux dispositions du statut nécessaires à l'obtention des dites Lettres Patentes.

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Judgment rendered the 27th. February, 1858.

DAY, Justice :—This case comes up on a *défense en droit* to the action, which is brought for the infringement of Patent Rights, under Letters Patent under the great seal of the Province for an improved Stove. The grounds of the defence, are :—

1st. That the plaintiff had not shewn that he had complied with the statute respecting Patents for inventions.

2nd. Nor that the Attorney General had examined the petition for the Patent.

3rd. Nor certified that the law had been complied with.



4th. Nor that the formalities required by law had been complied with, and that the discovery had not been made and was not in existence in the United-States.

5th. Nor that the plaintiff had a right of action under valid and effectual Letters Patent.

The *défense en droit* cannot be maintained. The plaintiff alleges that "he was the true and first inventor of "a new and improved double stove, and that therefore "Our Sovereign Lady the Queen, in Her Letters Patent "under the great Seal of the Province, bearing date, issued "and granted in favour of the plaintiff, the twenty-sixth "day of may eighteen hundred and fifty-seven &c., &c."

The Letters Patent are then set out at full length, including the specifications, and there is an allegation "that the "defendant, at a date mentioned, unlawfully, unjustly and "injuriously, and without leave or license of the plaintiff, "or his representative, did use and put in practice the said "invention and discovery, in contempt of the Letters Patent, "and to plaintiffs damage."

It is enough that the plaintiff recites the granting of the Letters Patent, and the infringement of the rights thereby conferred on him, and the damage. If there are any illegalities or informalities they cannot be decided on a *défense en droit*, when a clear right of action is shewn by the declaration.

Judgment :—Considering that the action of the plaintiff ought not by reason of the *défense en droit* in this cause filed, or of any thing assigned in support thereof, to be dismissed, the court doth dismiss the said *défense en droit*, with costs.

LECLANC and CASSIDY, for plaintiff.

CARTIER, BERTHELOT et POMINVILLE, for defendant.

BANC DE LA REINE, }  
 EN APPEL. } DISTRICT DE MONTRÉAL.

Présents :—Sir L. H. LaFontaine, Baronnet, Juge en Chef,  
 AYLWIN, DUVAL et CARON, Juges.

No. 41. { BERTHELET,..... Appellant.  
 et  
 { GUY *et al*,..... Intimés.

Jugé :—Qu'en matière de saisie immobilière, il n'est pas nécessaire de spécifier aux procès-verbal de saisie et aux annonces, la *contenance* de l'immeuble saisi, et que, dans l'espèce, les intimés ayant vendu le terrain en question sans en donner la contenance, n'en pouvaient invoquer l'absence sur la saisie.

Held :—That in the case of the seizure of real estate, it is not necessary to mention in the *procès-verbal* and notices, the contents of the property seized, and that, in the case submitted, the respondent having sold the real estate in question without mentioning its contents, could not urge the absence thereof in the *procès-verbal*.

Jugement rendu le 4me. Juin, 1858.

L'appelant, cessionnaire des intimés, ayant obtenu contre la compagnie du chemin de fer de Montréal à Bytown jugement pour le prix d'un immeuble vendu à cette dernière par les intimés, procéda à faire saisir le dit immeuble qui est ainsi décrit au procès verbal de saisie.

“ Un lot de terre situé dans le faubourg St. Louis de la ville de Montréal, de la contenance qu'il peut avoir tant en front qu'en profondeur, et renfermé dans les limites suivantes, savoir : depuis la rue Mignonne jusqu'au pied du Côteau-Barron, à la clôture de division entre le dit terrain et celui de Joseph Charles Hubert Lacroix, écr., et entre la propriété du dit Joseph Charles Hubert Lacroix, du côté Nord-Est, et celui de l'hon. D. B. Viger, du côté Sud-Ouest ; sujet néanmoins à l'arrangement fait par les exécuteurs testamentaires Louis Guy, et le dit Lacroix, devant Lamontagne, notaire, à Montréal, le vingt-unième jour d'Octobre, mil huit cent cinquante-cinq, pour une ruelle commune, chacune des parties au dit arrangement fournissant dix pieds français sur leurs propriétés respectives.”

Les intimés prétendant avoir un intérêt dans la vente de cet immeuble, comme cédants de l'appelant, produisirent

une opposition afin d'annuler, fondée sur le défaut de mention dans les annonces de la contenance du terrain saisi. Ils concluaient à ce que la saisie fût "déclarée nulle et mise au néant à raison de l'insuffisance de la désignation, et à ce qu'il fût enjoint au shérif de ne pas procéder à la vente du dit immeuble tel que désigné dans ses annonces."

L'appelant répondit que la description insérée au procès verbal était la même que celle contenue en l'acte de vente que les intimés avait consenti à la compagnie du chemin de fer; que la mention de contenance n'était pas nécessaire, (1) et que, d'ailleurs, ils n'alléguaient pas eux-mêmes quelle était la contenance du terrain en question.

La Cour Supérieure (L'hon. juge Badgley) prononça le 27 février 1858, le jugement qui suit :

"The Court.... considering that the opposants are interested in the piece or parcel of land under seizure by the sheriff, and in causing the same to realize and bring the highest price that can be obtained therefor, and considering that for that purpose the contents of the piece of land should have been set forth in the advertisement thereof by the said sheriff, and further considering that the said advertisement is defective, and not in conformity with law, from want of specification of the contents of the said lot of land, doth maintain the seizure of the said lot of land made by the sheriff, and doth order that the said lot of land be advertised *de novo*, in the manner and for the time required by law, and that in the said advertisement there be inserted therein the contents of the said piece or parcel of land, in addition to the bounds and limits and description of the same in and by the advertisement already made, each party paying his own costs."

(1) Ordonne du 3 Sept. 1851 (Henri 2.) art. 1er. Huissier ou Sergent tenu, lors de la saisie, de déclarer et spécifier, par le menu, en icelle saisie et première criée, les héritages et choses criées par *tenans et aboutissans* :—1 Duplessis, p. 630 Par *tenans* s'entend en expliquant la situation de chaque fonds et ses confins :—Pothier, Proc. Civile. De la saisie réelle, "Jamais l'étendue et la contenance ne peuvent être si bien désignées que par les *tenans* et *aboutissans* :—Voyez surtout Ferrière, sur l'art. 346 :—2 Bourjon, p. 713 :—Orléans, 466 :—Héricourt, 6, 12 :—1 Pigeau, Proc. Civile, p. 701 :—Voyez aussi la forme de l'avertissement donnée par le statut Provincial, 6 Guil., IV ch. 15 :—4 Ferrière, Grande Coutume, p. 1296.

De ce jugement appel fut interjeté, sur lequel appel intervint le jugement qui suit :

La Cour, etc. 1. Considérant que dans la procédure sur la saisie faite en cette cause, l'immeuble saisi est désigné comme suit, savoir : " un lot de terre situé dans le faubourg " St. Louis de cette ville, de la contenance qu'il peut avoir " tant en front qu'en profondeur, et enfermé dans les limites " suivantes, savoir : depuis la rue Mignonne jusqu'au pied " du côteau Barron, à la clôture de division entre le dit " terrain et celui de Joseph Charles Hubert Lacroix, écuier, " et entre la propriété du dit J. C. H. Lacroix, du côté " Nord Est, et celle de l'hon. D. B. Viger, du côté Sud " Ouest, sujet néanmoins à l'arrangement fait par les exé- " cuteurs testamentaires Louis Guy, et le dit Lacroix, de- " vant Lamontagne, notaire, à Montréal, le 21 octobre 1855, " pour une ruelle commune, chacune des parties au dit ar- " rangement fournissant dix pieds français sur leur profon- " deur respective." 2. Considérant qu'à raison de cette désignation, il n'y avait pas lieu d'attaquer la dite saisie de nullité, et d'en demander la main levée ; que par conséquent l'opposition *afin d'annuler*, présentée par les intimés, par laquelle ils concluent purement et simplement à cette nullité, et à cette main levée, est mal fondée et aurait dû être renvoyée ; qu'ainsi dans le jugement dont est appel, il y a mal jugé, en ce que la Cour de première instance n'a point débouté les intimés de leur dite opposition : Infirme le susdit jugement, savoir le jugement rendu le 27 février 1858, par la Cour Supérieure siégeant à Montréal, avec dépens contre les intimés sur le présent appel ; et cette Cour, procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, déboute les intimés de leur susdite opposition, et les condamne aux dépens d'icelle en la dite Cour Supérieure.

LAFLAMME, LAFLAMME et BARNARD, pour l'appelant.

CHERRIER, DORION et DORION, pour les intimés.

## SUPERIOR COURT.—MONTREAL.

Before :—MONDELET, Justice.

No. 2515. { STROTHER..... Plaintiff.  
 vs.  
 { TORRANCE..... Defendant.

Held:—That in an action for wages as purser of a steamer, the plea of prescription of six years under the 10th. and 11th. Vict., Chap. 11, is a good plea; and that no interruption of prescription is made out by proving that the defendant told the plaintiff that if any thing was found to be due him it would be paid

Jugé :—Que dans une action pour salaire par un commis, *purser*, sur un vapeur, le plaidoyer de prescription par six ans, en vertu de l'acte 10<sup>me</sup> et 11<sup>me</sup> Vict., chap. 11, est valable; et qu'il n'est établi aucune interruption de prescription en prouvant que le défendeur avait dit au demandeur que s'il était constaté qu'il lui était dû aucune somme il en serait payé.

Judgment rendered the 27th. March, 1858.

MONDELET, Justice :—This is an action for wages alleged to be due since 1849 to the plaintiff as purser of a steamer. 1st. Plea, that there were other owners besides the defendant. 2nd. Plea, prescription of six years under the 10th. and 11th. Vict., chap. 11. 3rd Plea, prescription of one year. 4th. Plea, compensation. 5th. Plea, payment 6th Plea, *defense en fait*. To the second plea the plaintiff replied by alleging the defendant's promise to pay within six years. The case turns entirely on the 2nd plea which must dismiss the action. The only proof of the interruption of prescription is contained in the defendant's answer which is clearly insufficient. He says : " I never made the plaintiff any promise to pay him, but " told him if any thing was found to be due him it would " be paid."

Judgment.— " Considering that the defendant hath justified and proved his *second* plea, to wit: that there hath " accrued to him and in his favor, and against the plaintiff's " demand, a prescription of six years by and in virtue of " the provincial statute 10th. and 11th. Vict., ch. 11, where- " by and by the effect whereof the plaintiff, at the time he " instituted his present action, had no right in law so to do " &c., doth dismiss the plaintiff's action with costs.

DEVLIN and FLEMING, for plaintiff.

CROSS and BANCROFT, for defendant.

## SUPERIOR COURT.—QUEBEC.

Before :—CHABOT, Justice.

No. 1103. { MILLER *et al.*.....*Plaintiffs.*  
                   { vs.  
                   { McDONALD *et al.*.....*Defendants.*

**Held :—**That an application by defendants to enlarge the delay to plead, presented after *Acte* of foreclosure granted, cannot be entertained by a judge while the foreclosure subsists; and that notice of such application, served on the plaintiffs before the expiration of the delay to plead, does not suspend the plaintiffs' right to obtain such foreclosure.

**Jugé :—**Qu'une application par des défendeurs à l'effet que le délai pour plaider soit prolongé, faite après l'obtention d'un acte de forclusion, ne peut être entretenue par un juge pendant que l'acte de forclusion subsiste; et qu'avis de telle application signifié aux demandeurs avant l'expiration du délai pour plaider ne suspend pas le droit des demandeurs d'obtenir telle forclusion.

Judgment rendered the 17th June 1858.

The plaintiff demanded an account from the defendants of their management of the copartnership business which had formerly been carried on between the parties at Montreal, under the firm of William Miller & Co., and at Quebec and Portneuf under the firm of McDonald and Logans. By their declaration the plaintiffs alleged that they had always duly accounted annually with the defendants who had accepted the accounts; and they filed a copy of the accounts so rendered on the return day (15th April, 1858,) the defendants appeared on the following day. A demand of plea was served on the 26th April. The delay to plead was enlarged on petition of the defendants to the 15th June to enable them to examine the accounts and prepare their defence. On the 14th June, the defendants gave notice that on the 16th, they would apply to a judge to enlarge the delay to plead until the plaintiffs should file certain subsidiary books and vouchers, and thence for a sufficient time to enable them, the defendants, to examine and understand the accounts. This application was supported by affidavits. On the morning of the 16th June, *Acte* of foreclosure was granted against the defendants on a certificate of no plea having been filed.

STUART, AND. Q. C., in support of application :—The foreclosure is of no effet. The notice served on the plaintiffs before the expiration of the delay to plead suspends the power to foreclose the defendants from pleading.

POPE THOS., *contra*,—The foreclosure has been regularly obtained. There cannot be an enlargement of a delay to plead when the delay has already expired. The application comes too late. It should have been made on or before the 15th. It is not in the power of a Judge in Chambers to set aside the foreclosure, and, while it remains of record, this application cannot be granted. The plaintiffs cannot be affected by the service of notice of an application which might never be acted upon by the defendants, or for the presentation of which they might choose the 1st September next, or any other remote period.

CHABOT, Justice :—The application cannot be granted. The defendants have been regularly foreclosed and I have therefore no power in the matter. If the defendants desire to be relieved from their default, they must apply to the Court.

POPE, THOS., for plaintiffs.

STUART and VANNOVUS, for defendants.

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BANC DE LA REINE, } DISTRICT DE MONTRÉAL.  
 EN APPEL.

Présents:—Sir L. H. LaFontaine, Bart., Juge-en-Chef,  
 AYLWIN, DUVAL, et CARON, Juges.

No. 158. { BERTHELET,..... Appellant.  
 et  
 { GUY *et al.*,..... Intimés.

Jugé:—1. Qu'un cessionnaire d'une créance a droit d'intervenir sur la saisie immobilière faite au nom des cédants, avant la signification du transport pour le profit du cessionnaire; et aussi d'être déclaré propriétaire de la créance et maître de la procédure.

2o. Que les cédants sont mal fondés à contester semblable demande, et à prétendre au remboursement préalable des frais encourus tant sur l'action que sur la saisie.

3o. Que, dans l'espèce, l'acte intervenu entre l'appellant et les intimés est un transport qui a rendu l'appellant propriétaire de la créance.

Held:—1o. That the assignee of a debt is entitled to intervene on the seizure of the immoveable property of the debtor, made in the name of the assignor, before notification of the assignment for the benefit of the assignee; and also to be declared proprietor of the debt and *dominus litis* in the proceedings.

2o. That the assignor has no right to contest such a demand, nor to claim to be first reimbursed the costs by him incurred as well on the suit as upon the seizure.

3o. That, in the case submitted, the deed between the appellant and the respondents is an assignment which has made the appellant proprietor of the debt.

Jugement rendu le 4me juin, 1858.

Les intimés, exécuteurs testamentaires et administrateurs des biens dépendant de la succession de feu l'Hon. Louis Guy, ayant obtenu, le 31 Mars 1856, un jugement pour la somme de £1,360 qui leur était due en vertu d'un acte de vente qu'ils avaient consenti à la Compagnie du chemin de fer de Montréal et Bytown, firent saisir, sur cette compagnie, la propriété qu'ils lui avaient vendue.

Le 13 février 1857, l'appellant produisit au bureau du shérif une opposition afin d'annuler, dans laquelle il alléguait: 1o. La vente faite par les intimés à la compagnie du chemin de fer de Montréal et Bytown pour £4,000; 2o. Un transport du 26 juin 1855, passé devant Doucet, Notaire, et par lequel les intimés lui avaient transporté la somme qui leur était due en vertu de cet acte de vente; 3o. Que ce transport avait été signifié à la compagnie du chemin de fer; 4o. Que les demandeurs avaient obtenu jugement



contre la compagnie, et qu'en vertu de ce jugement ils avaient fait saisir la propriété qu'ils avaient vendue à la compagnie ; 50. Qu'en conséquence, l'intimé était le seul propriétaire de la créance en vertu de laquelle la saisie avait eu lieu, et il concluait à ce que cette saisie fut déclarée nulle, si mieux n'aimaient les intimés consentir à ce que la vente fût faite au nom et au profit de l'appelant.

Les intimés contestèrent cette opposition en alléguant que le transport du 26 juin 1855, n'avait conféré à l'appelant d'autres droits que celui de percevoir le montant de la créance transportée pour l'appliquer au paiement des dettes de la succession de feu l'Hon. Louis Guy ;

Que l'appelant n'était à cet égard que le mandataire des intimés, ce qui ne les empêchait pas d'adopter eux-mêmes les procédés nécessaires pour recouvrer leur créance ;

Que le jugement rendu en la cause avait été obtenu depuis le transport, et sur une poursuite intentée au nom des intimés, à la connaissance et du consentement de l'appelant ;

Que les intimés avaient encouru des frais d'au moins £25 pour obtenir ce jugement et faire faire la saisie, et que ces frais seraient perdus si l'opposition de l'appelant était maintenue, et qu'à tout événement l'appelant aurait dû offrir ces frais en demandant à faire suspendre la vente ;

Que l'appelant n'avait aucun intérêt à faire cette opposition, ni aucun droit de demander que la vente fût faite en son nom, et ils concluaient au renvoi de l'opposition.

L'appelant répondit à cette contestation que le transport du 26 juin lui avait été fait pour bonne et valable cause, et qu'à cette époque il était créancier de la succession Guy au montant de £3,000 courant ;

Que par cet acte il avait assumé toutes les dettes de la

succession Guy, qu'il avait promis de payer, et qu'il avait de fait alors payé plus de £1,000 des dites dettes ;

Que par cet acte de transport il avait renoncé à l'hypothèque qu'il avait sur la terre de Berry, appartenant à la succession Guy.

Que cet act était un véritable transport et non un mandat, et que l'appelant n'avait jamais consenti à ce qu'une action fût portée par les intimés pour recouvrer cette créance.

Les intimés répliquèrent que ces réponses de l'appelant étaient mal fondées en droit et en fait ;—que longtemps avant qu'il eût filé son opposition l'appelant était payé des deux jugements qu'il avait invoqués dans ses réponses ; que quant à la créance qu'il prétendait avoir comme représentant Mlle Josephite Guy, c'était la succession de cette dernière qui leur était endettée ; que la renonciation faite par l'appelant à son hypothèque sur la terre de Berry n'était pas la considération qui avait engagé les intimés à lui faire ce transport, mais que cette renonciation n'avait été faite que pour faciliter le partage de la terre comme sous le nom de Berry, cette renonciation n'étant, d'ailleurs, que conditionnelle ; qu'enfin l'appelant n'avait payé aucune des dettes mentionnées au transport.

Par ses réponses sur faits et articles, l'appelant admit qu'il avait autorisé une poursuite contre la compagnie du chemin de fer de Montréal et Bytown, au sujet de la créance en question, mais qu'il ne se rappelait pas la nature de la poursuite.

Sur cette preuve la Cour Inférieure, le 27 Mars 1857, rendit le jugement suivant :

“ The Court, &c., considering that the said opposant hath failed to establish, by reason of any of the allegations in his said opposition, or any right in Law to the conclusions

of the said opposition, nor any interest whatever to oppose the sale and adjudication of the lot of land seized and taken in execution in this cause, as mentioned and described in the *procès-verbal* of seizure annexed to the writ of execution issued in this cause, doth dismiss the said opposition *afin d'annuler* with costs.

L'appelant, disaient les intimés, a jugé à propos d'appeler de ce jugement ; mais il suffit de faire remarquer que s'il est réellement le cessionnaire de la créance en question, toutes les poursuites que les intimés peuvent faire contre la compagnie du chemin de fer ne peuvent affecter sa créance. La compagnie pourrait peut-être s'opposer à ces poursuites, mais l'appelant est sans grief. Il est de plus certain que les poursuites faites au nom du cédant profitent au cessionnaire, et sous ce rapport l'appelant n'a aucun intérêt à empêcher ces poursuites. Mais les intimés qui sont les vrais créanciers du chemin de fer, et qui n'ont transporté leur créance que pour mettre M. Berthelet à même de payer leurs dettes, ont un bien grand intérêt à ce que ces poursuites se fassent sans délai. L'appelant y a consenti, et sa prétention d'empêcher la vente de la propriété parce qu'elle se fait à la poursuite des intimés, et de faire substituer son nom aux leurs dans le writ d'exécution, n'est aucunement fondée.

Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef :— Le *factum* des intimés expose assez bien l'état de la question.

Par l'acte de transport dont il s'agit, Berthelet, créancier lui-même de la succession Guy, à un très fort montant, commence par " assumer les dettes des différentes parties mentionnées en l'état qui y est annexé, autres que les siennes propres, et promet acquitter les dites créances à quelques sommes qu'elles puissent se monter, à l'entier acquit et " décharge de la succession Guy, qu'il promet garantir et " indemniser contre tous troubles, frais et poursuites pro-

“ venant et étant la conséquence des dites créances mentionnées au dit état.”

Il y est ensuite dit que l'obligation de Berthelet de payer aux créanciers, “ commencera et ne datera que du jour du jugement de collocation dans la cause de DeBleury contre Hyp. Gny et autres, pourvu qu'il ait été colloqué utilement, et son obligation ne s'étendra qu'à la somme qui lui sera adjugée, et autres deniers qu'il percevra sur les transports ci-après mentionnés.”

Berthelet s'engage de ne pas faire, dans la cause de De Bleury contre la succession, d'opposition pour la créance de Mlle. Josephite Guy.

Les exécuteurs testamentaires lui transportant la somme due à la succession par les Sœurs de la Charité, que Berthelet dit bien connaître.

Ils lui transportent, *sans garantie*, la somme due par la défenderesse (la compagnie du chemin de fer), en vertu de l'acte du 29 déc. 1853.

Puis, comme propriétaire de la créance de Mlle Guy, de celle de Samuel Gerrard, et de la somme de £700 mentionnée au susdit état, Berthelet décharge de toute hypothèque à cet égard la terre de Berry appartenant à la succession. Il est ajouté : “ Cette renonciation étant conditionnelle, et ne devant avoir son effet qu'au cas où il ne se découvrirait aucune autre hypothèque que celles mentionnées au dit état, sur la terre de la *Bourgogne*.”

Enfin vient la clause suivante :

“ Il est entendu entre les parties, qu'en autant que les dites sommes ainsi transportées pourraient se trouver plus considérables que le montant des dettes que M. Berthelet assume, surtout si le montant de la collocation dans la dite cause de DeBleury contre Guy et autres est élevé, le dit M. Berthelet s'oblige de rembourser à la dite succes-

“ sion la différence entre la somme qu’il aura ainsi retirée  
 “ en vertu des dits transports, et la somme réellement due  
 “ par la succession aux créanciers mentionnés en l’état  
 “ annexé aux présentes, une fois que ce montant réel aura  
 “ été constaté, M. Berthelet promettant faire toutes les  
 “ démarches nécessaires pour faire déterminer la créance  
 “ de mademoiselle Josephite Guy, et des héritiers Etienne  
 “ Guy, sous le plus court délai, et les dits exécuteurs tes-  
 “ tamentaires et administrateurs s’engageant de lui donner  
 “ toutes les facilités en leur pouvoir pour atteindre le dit  
 “ objet, et de lui tenir compte de toutes les dépenses et dé-  
 “ boursés qu’il fera avec l’intention et dans le but d’être  
 “ utile à la succession, et d’en promouvoir les intérêts à l’é-  
 “ gard des présentes.”

L’action a été intentée au nom de la succession, la cé-  
 dante, et le jugement obtenu avant la signification du trans-  
 port en question, laquelle signification n’a eu lieu que le  
 26 novembre 1856. Que Berthelet y eût donné son con-  
 sentement ou non, l’action n’en procédait pas moins vala-  
 blement au nom de la cédante, tant que le transport  
 n’était pas signifié. Ce n’est que par cette signification  
 que Berthelet est devenu saisi de la créance. Mais du mo-  
 ment qu’il en a été saisi, il est devenu maître de la créance,  
 maître du jugement, et maître de la procédure à faire pour  
 l’exécuter.

C’est à tort que les intimés prétendent que Berthelet n’é-  
 tait que leur mandataire ; rien dans l’acte du 26 juin 1855,  
 ne justifie cette prétention. C’est une cession réelle, en  
 bonne et due forme, et qui, ayant été suivie de signification,  
 a fait passer sur la tête de Berthelet la créance dont il s’agit.  
 Si Berthelet n’était que mandataire, les intimés n’avaient  
 pas besoin de son consentement pour porter l’action, obtenir  
 jugement et le faire exécuter. Cependant ils ont si bien com-  
 pris que tel n’était pas le cas, qu’au contraire Berthelet, seul  
 était le maître de cette créance, que pour se justifier, ils  
 ont invoqué un tel consentement de la part de Berthelet, et

qu'ils l'ont interrogé sur faits et articles pour en obtenir la preuve par ses aveux. Si ce consentement a été demandé, et qu'il ait été donné, ce n'est donc pas Berthelet qui est mandataire des intimés, mais bien les intimés qui, dans ce cas, seraient devenus les mandataires de Berthelet. Ils n'ont pas d'autre qualité, d'autre autorité, pour continuer la procédure, que ce même mandat résultant du consentement qu'ils invoquent, or, un tel mandat est révoquable à volonté, soit expressément soit tacitement. " Le mandat peut être révoqué en tout état de cause. Le mandant ne doit au mandataire aucune explication, et ce dernier ne saurait élever de controverse pour prouver que la révocation est intempestive, injuste, capricieuse, ou dicté par l'erreur ou la colère. La volonté du mandant est souveraine : *stat pro ratione voluntas* ; le mandataire doit l'accepter et s'y résigner. (1)

" Supposez," ajoute le même auteur, au No. 780, " que, dans une affaire qui se traite par mandataire, le mandant intervienne lui-même, et se mette en rapport direct avec les tiers, prenant qualité, décidant les difficultés, arrêtant les résolutions, etc., etc., il est évident que cette com-parution du mandant fera évanouir les pouvoirs du mandataire."

Il y a ici même plus qu'une révocation tacite, elle est expresse, puisque Berthelet conclut, en présence des intimés et contre eux " à ce qu'ordre soit donné au shérif de ce district de suspendre tous ses procédés sur les criées, vente, adjudication et publication de la dite terre ou immeuble," qu'il va même jusqu'à demander que la saisie soit déclarée nulle. Supposant que Berthelet ait donné le consentement dont il s'agit, et par conséquent l'autorité de poursuivre qui en découle, est-ce qu'un tel mandat est irrévocable ? Où est la loi qui lui imprime cette irrévocabilité ? Autant vaudrait dire qu'un procureur *ad litem* qui aurait été chargé

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(1) Troplong, Mandat, No. 765.

directement par Berthelet de commencer ce procès, aurait eu le droit de le continuer non seulement jusqu'à jugement mais encore jusqu'à expropriation forcée du débiteur, malgré les défenses et les ordres au contraire de son client. Cependant tel est de fait la prétention plus qu'étrange des intimés, qui, quoique bien et dûment *dessaisis* de la créance, disent à celui qui en est saisi, et par conséquent le seul maître : " " Vous avez consenti à la poursuite, nous " en ferons maintenant ce que nous voudrons, vous n'avez " pas le droit d'intervenir, nous procéderons malgré vous " à un décret forcé, bien que vous soyez d'avis, et peut-être " avec raison, que la propriété saisie sera sacrifiée à un décret fait dans les circonstances actuelles, nous savons " mieux que vous ce qu'il vous convient de faire, en un mot, " de notre propre autorité, et cela seulement parceque nous " sommes vos cédants, nous vous mettrons sous notre tutelle." Si vraiment les intimés sont maîtres du procès, et qu'à ce titre ils nient le droit, malgré la volonté de Berthelet, de procéder à l'exécution du jugement, au même titre, et pour la même raison, ils auraient aussi le droit de se refuser à cette exécution, bien que Berthelet voulût y faire procéder. Pour moi, je dois avouer que je trouve la prétention des intimés plus qu'étrange.

On ne saurait nier que Berthelet soit celui qui a le plus grand intérêt à ce procès, puisque ce procès a pour objet sa propre créance. Le procès n'étant pas introduit en son nom, il a donc le droit d'y intervenir pour se faire reconnaître et veiller à ses intérêts. " On appelle *Intervention*," dit Merlin, " collectivement, et l'action par laquelle on intervient dans une contestation dans un procès, et les suites de cette action."

" L'intérêt étant la mesure des actions, on a le droit d'intervenir dans une contestation, toutes les fois qu'on a intérêt à être en cause." (1)

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(1) Bioche, Vbo. *Intervention*, No. 5.

“ Ainsi peuvent intervenir 1o. celui dont la chose, les droits ou la qualité sont l'objet des prétentions respectives des parties, ou l'occasion du procès.” (1)

“ Le cessionnaire d'une créance dans une instance relative à cette créance, pendant entre le cédant et le débiteur, quoiqu'il n'ait pas encore fait signifier son intervention au débiteur, alors que dans sa requête, il a signifié ses titres à ce dernier. (2)

Un créancier inscrit, qui, par la date de son inscription, se trouve exposé à perdre le montant de sa créance, si l'adjudication est maintenue, est recevable à intervenir sur l'appel et à conclure de son chef à la nullité des poursuites : *on dirait en vain qu'il a été représenté par le poursuivant.* (3)

Une partie qui a intérêt d'être en cause, y intervient de différentes manières ; tantôt c'est par une reprise d'instance, tantôt par une requête en intervention proprement dite, ou par une opposition. Ce procédé prend des noms différents, suivant l'état de la cause, lors de son introduction. Il s'appelle particulièrement *opposition*, lorsqu'il est relatif à une saisie. Tel est le cas dans la présente instance.

Admettant même que Berthelet ait consenti à la saisie, ce consentement n'en était pas moins toujours révocable à sa volonté. Il pouvait intervenir en tout temps pour en arrêter les suites, s'il trouvait qu'il était de son intérêt de le faire. Et en cela c'est son seul intérêt, sa seule volonté, qui doivent être écoutés, Berthelet n'étant pas partie dans la cause, le shérif ne pouvait recevoir de lui l'ordre de suspendre les procédés sur la saisie ; il ne pouvait recevoir cet ordre que du procureur *ad litem* qui a fait émaner le mandat d'exécution, ou du tribunal d'où ce mandat a été ainsi émané. Pour obtenir ce dernier ordre, Berthelet devait intervenir ; c'est ce qu'il a fait par son opposition, au moyen

(1) Ibid., No. 6.

(2) Ibid., No. 10.

(3) Dalloz, Intervention, p. 584, *Sabatier vs. Debosque*, 30 Déc. 1816.



de laquelle, présentant les titres qui l'ont saisi, lui seul, de la créance, il devait être reconnu comme tel, déclaré maître de la procédure, et obtenir du moins, dans tous les cas, la première partie de ses conclusions, celle qui tend à la suspension des procédés sur la saisie.

Si, comme l'a décidé la Cour de première instance, Berthelet n'avait pas le droit d'intervenir comme il l'a fait pour l'objet en question, il semble qu'il y aurait la même raison de repousser toute intervention de sa part, dans le cas où la saisie étant faite de son consentement aurait néanmoins plus tard été arrêtée par ordre des intimés, à son préjudice et malgré sa volonté et son intérêt de continuer les procédés jusqu'à leur fin ; car si les intimés, et non Berthelet, sont les maîtres du procès, ils avaient le droit de suspendre, de même que de continuer, cette saisie à leur gré, sans entraves de la part du vrai et seul créancier, qui, par là, se trouve être à leur merci. Pour la même raison, admettant toujours le cas d'une saisie faite de son consentement, si cette saisie eût été contestée par le défendeur, Berthelet n'aurait pas été reçu à entrer en cause pour soutenir ses droits et ses intérêts en défendant la validité de la saisie, même dans le cas possible où les demandeurs, ses cédants, se seraient abstenus de faire valoir la régularité et la légalité de la saisie. Si c'est là une position que la loi fait à un créancier qui se trouve dans les circonstances où est Berthelet, j'avoue candidement que j'ignore où trouver cette loi. Je connais bien un texte qui dit que le transport signifié saisit le cessionnaire, mais je n'en connais pas qui porte que, nonobstant le transport signifié, le cédant restera néanmoins maître de la créance qu'il a cédée, ainsi que des procédures à adopter pour en faire le recouvrement.

Les intimés ont encore prétendu qu'en supposant que Berthelet eût le droit d'être admis à intervenir, comme il a voulu le faire, l'exercice de ce droit devait être subordonné à la condition de faire, au préalable, offres réelles de payer les frais encourus par les intimés pour lui Berthelet. Je ne

connais pas de loi qui le soumet à cette condition. Que l'on remarque que cette dernière proposition des intimés est une admission de leur part que, dans ce qu'ils ont fait dans cette cause, il n'ont agi que comme mandataires de Berthelet. En effet ils n'ont pu avoir d'autre qualité que cette qualité de mandataire, or, comme tout mandataire, ils ont droit de se pourvoir contre leur mandant pour le remboursement de ce qu'ils ont déboursés pour lui dans l'accomplissement du mandat, et d'obtenir condamnation, si le mandant ne fait pas voir qu'il est à l'abri d'un pareil recours de leur part, ce sur quoi il peut y avoir débat entre eux, ayant probablement des raisons réciproques à se faire.

Admettant, quoique je ne sois pas bien satisfait de la preuve à cet égard, que la procédure jusqu'à saisie même, inclusivement, a eu lieu du consentement de Berthelet, je serais d'avis de lui accorder seulement la première partie de ses conclusions, et non la seconde par laquelle il demande que la saisie soit déclarée nulle et de nul effet.

Jugement.—La Cour,.... 1. Considérant que lors du jugement qui a condamné la défenderesse à payer aux demandeurs, ès-noms et qualités, intimés, la somme portée au dit jugement, le dit appelant Berthelet était le seul propriétaire et créancier de la dite somme, comme faisant partie d'une plus forte créance qui lui avait été cédée par les dits intimés par acte de transport du 26 juin 1855, lequel transport, en outre, a été dûment signifié à la débitrice le 28 novembre 1856, c'est-à-dire postérieurement à la saisie immobilière pratiquée en cette cause, et tandis que la dite saisie était encore pendante et en pleine opération; 2. Considérant que si l'action a été introduite au nom des intimés, et la procédure subséquente, en y comprenant la dite saisie, conduite par eux, cela n'a été que du consentement du dit appelant Berthelet, lequel consentement ils ont eux-même invoqué pour leur propre justification; que l'autorité résultant d'un tel consentement ne pouvait constituer, en faveur

des dits intimés, qu'un simple mandat révocable à la volonté du dit Berthelet ; que ce mandat n'a pas eu et n'a pas pu avoir l'effet d'empêcher le dit Berthelet de s'introduire dans l'instance pour veiller directement lui-même à ses propres intérêts, et même se faire subroger aux lieu et place des intimés, des droits desquels il est le cessionnaire ; que ce droit d'intervenir dans l'instance appartient à tout cessionnaire dûment saisi et placé comme l'est l'appelant ; qu'en pareil cas le cessionnaire a droit de se rendre maître du procès, et de diriger la procédure comme il l'entend, soit en arrêtant, soit en continuant les procédés du shérif sur une saisie précédemment faite, selon qu'il le juge conforme à ses intérêts ; 3. Considérant que, dans les circonstances, l'opposition formée par le dit Berthelet comporte une demande en intervention dans l'instance, de la nature de celle que tout tel cessionnaire a droit de formuler pour être admis à diriger lui-même la procédure de cette instance ; 4. Considérant que les conclusions prises par le dit Berthelet en sa dite demande doivent lui être accordées, à l'exception de celle qui tend à faire déclarer nulle et de nul effet la susdite saisie, puisqu'il n'a pas établi que la procédure sur cette saisie, jusqu'à sa dite intervention, soit entachée de nullité ; que, par conséquent, dans le jugement dont est appel, il y a mal jugé, en ce qu'il rejette en entier la demande et les conclusions du dit Berthelet ; Infirme le susdit jugement rendu le 27 juin 1857, par la Cour Supérieure à Montréal, avec dépens contre les intimés sur le présent appel :—Et cette Cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, admettant partie des conclusions prises par le dit Berthelet dans son opposition, déclare et adjuge que, comme cessionnaire et seul créancier, comme susdit, il était bien fondé à intervenir dans l'instance, le reçoit ainsi partie dans icelle ; et, conformément à l'une de ses conclusions, cette Cour adjuge et ordonne qu'ordre soit donné au shérif du district de Montréal, de suspendre tous ses procédés sur les criées, vente et adjudication de l'immeuble saisi en cette cause, jusqu'à

nouvel ordre de la part de la dite Cour Supérieure, mais déboute le dit Berthelet de sa susdite conclusion tendant à faire déclarer la dite saisie nulle et de nul effet, des frais de laquelle saisie, ainsi que de l'action, le dit Berthelet est déclaré être responsable envers qui de droit, de même que si l'instance eût été originairement conduite en son propre nom; enfin condamne les demandeurs intimés aux frais encourus sur la contestation de la dite opposition du dit Berthelet.

**LAFLAMME, LAFLAMME et BARNARD**, pour l'appelant.

**CHERRIER, DORION et DORION**, pour les intimés.

**BANC DE LA REINÉ, }** **DISTRICT DE MONTRÉAL.**  
**EN APPEL.**

Présents :— **Sir L. H. LAFONTAINE**, Bart. Juge-en-Chef,  
**AYLWIN, DUVAL et CARON**, Juges.

**QUINTIN dit DUBOIS et al**,..... *Appellants.*  
 et

**GIRARD et al**,..... *Intimés*

Jugé :—Qu'une donation entre vifs ne peut être assujettie à la déduction de la légitime, si le donateur a plus tard disposé de ses biens par testament.

Held :—That a donation *inter vivos* cannot be subjected to reduction by reason of the *legitime*, if the donor has subsequently disposed of his estate by will.

Jugement rendu le 1er Mars, 1858.

**Sir L. H. LAFONTAINE**, Bart., Juge-en-Chef :—Du mariage d'Amable Sénécal avec Angélique Favreau sont nés plusieurs enfants, du nombre desquels se trouvent les trois demandereses et la défenderesse, et feu Sophie Sénécal, mère des quatre mineurs Monjeau, qui sont aussi demandeurs.

Angélique Favreau, dans la succession de laquelle cette légitime est réclamée par les demandeurs, avait survécu à son mari, celui-ci étant décédé en novembre 1849, et sa femme seulement en mai 1854.

Il est allégué dans la déclaration, entre autres choses, que la dite Angélique Favreau avait, par divers actes entre-vifs, fait des avantages considérables à quelques-uns de ses enfants, savoir à trois de ses fils et à la défenderesse Adeline Senécal, tandis que les autres enfants, et entre autres les demanderesses, n'avaient rien reçu d'elle, soit par acte entre-vifs ou de dernières volontés ; que, sans ces dispositions entre-vifs, la dite Angélique Favreau aurait laissé à partager dans sa succession, des biens d'une valeur d'au moins 44,000 francs, ce qui aurait fait pour chacun de ses héritiers, au nombre de onze, (les enfants Monjeau comptant pour une souche), une somme de 4,000 fr.

Puis les demanderesses et les enfants Monjeau prétendent que n'ayant rien reçu, ils sont bien fondés à demander leur légitime.

Il est à remarquer que, dans leur déclaration, ils ont allégué que la dite Angélique Favreau était décédée *sans avoir fait de testament*. Cette assertion a été contredite par les défendeurs qui ont invoqué et produit un testament solennel fait par elle le 6 août 1845, par lequel testament, après avoir légué aux enfants Monjeau la somme de 300 francs pour être partagée entre eux, elle institue ses dix autres enfants ses légataires universels en propriété, " sujets néanmoins ses dits enfants à rapporter tout ce qu'ils ont reçu par actes de la dite testatrice leur mère afin de s'égaliser entre eux."

Les avantages conférés aux défendeurs par acte entre-vifs, sont ceux qui résultent de la cession ou donation que la dite Angélique Favreau leur a faite, par leur contrat de mariage du 13 Oct. 1851, 1o d'une terre à Varennes de trois arpents sur trente ; 2o d'une certaine coupe de bois ; 3o de la jouissance et usufruit, la vie durant de la donatrice, d'un demi arpent de terre sur neuf ; 4o enfin de tous les meubles de ménage, animaux et grains, argents et autres effets et valeurs qui appartiendraient à la dite donatrice lors de son

décès, excepté néanmoins ses hardes et linges qui devaient être partagés également entre ses filles lui survivant, la future épouse (la défenderesse) non comprise.

La principale question est celle de savoir si, dans les circonstances qui viennent d'être exposées, le droit de légitime peut être valablement réclaté, ou si au contraire les dispositions du statut impérial de 1774, (l'acte de Québec) et de notre statut Provincial de 1801, rendent les demandeurs non recevables à faire valoir cette réclamation.

" La légitime," porte l'art. 298 de la Coutume de Paris, " est la moitié de telle part et portion que chaque enfant eût eue en la succession des dits père et mère, ayeul ou ayeule, ou autres ascendants, si les dits père et mère ou autres ascendants n'eussent disposé par donation entre-vifs ou dernière volonté : sur le tout déduit les dettes et frais funéraires." C'est, comme on le voit, une portion de ce que l'enfant aurait pu avoir *ab intestat*.

L'article 272 de la même Coutume permet à toute personne dûment âgée de disposer par donation *entre-vifs* " de tous ses meubles et héritages propres, acquêts et conquêts à personne capable," et l'article 292 lui permet de disposer par testament et ordonnance de dernière volonté, " de tous ses biens meubles, acquêts et conquêts immeubles, et de la cinquième partie de tous ses propres héritages, et non plus avant." La défense de tester au-delà du quint des propres avait donc l'effet de conserver aux héritiers les quatre autres quintes ; c'était une réserve que l'on appelait *réserve coutumière*, parce qu'elle était établie par la Coutume elle-même.

Puis, selon l'article 303, " Père et mère ne peuvent par donation faite entre-vifs, par testament et ordonnance de dernière volonté, ou autrement en quelque manière que ce soit, avantager leurs enfants, venans à leurs successions, les uns plus que les autres ; " et " les enfants venans à la succession de père ou mère, doivent rapporter ce qui leur a été

donné, pour, avec les autres biens de la dite succession, être mis en partage entre eux, ou moins prendre," Art. 304. "Néanmoins," ajoute l'art. 307, "où celui auquel on aurait donné se voudrait tenir à son don, faire le peut, en s'abstenant de l'hérédité, *la légitime réservée aux autres.*"

Enfin notre ancien droit établissait chez certaines personnes des incapacités de recevoir par testament etc.

Voyons à présent quelles sont les dispositions de nos deux statuts de 1774 et de 1801.

On lit dans le premier, section 10: "Il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles, meubles ou intérêts, dans la dite province, qui aura le droit d'aliéner les dits immeubles, meubles ou intérêts pendant sa vie, par ventes, donations, ou autrement, de les tester et léguer à sa mort par testament et acte de dernière volonté, nonobstant toutes lois, usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en la dite province; soit que tel testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre."

Des doutes s'élevèrent sur le sens de cette disposition. Il paraît que l'on a prétendu qu'elle n'allait pas assez loin pour faire disparaître les incapacités de recevoir, dont étaient frappées certaines personnes, et abolir toutes les réserves que la Coutume de Paris avait consacrées en faveur des héritiers du sang. On a pensé, et c'est ce que nous a dit l'avocat des appelants, que l'acte de 1774 n'avait eu d'autre effet que de donner à la faculté de disposer par testament la même étendue qu'avait celle de disposer par acte entre-vifs; c'est-à-dire qu'à l'avenir un testateur pouvait léguer "tous ses meubles et héritages propres, acquêts et conquêts à personne capable," (Art. 272 de la C. de Paris). Supposant donc que ce soit là le seul effet qu'ait dû produire le statut impérial, c'est d'ailleurs reconnaître de

la manière la plus formelle qu'il a aboli la *réserve* coutumière des quatre quintes des propres dont l'article 292 de la coutume ne permettait pas de disposer par testament. Ainsi, si, dans l'acte déclaratoire de 1801, l'on retrouve le mot *réserve*, il devra nécessairement s'entendre d'une autre réserve que celle des quatre quintes.

Les doutes dont je viens de parler donnèrent lieu à la disposition suivante de l'acte de 1801 (1): " Il est et sera loisible à toutes personne ou personnes saines d'entendement et d'âge, usant de leurs droits, de léguer et disposer, par testament ou actes de dernière volonté, soit entre conjoints par mariage en faveur de l'un ou de l'autre des dits conjoints, soit en faveur de l'un ou plusieurs de leurs enfants à leur choix, ou en faveur de qui que ce soit, de *tous* et *chacuns* leurs biens, meubles ou immeubles, quelque soit la tenure des dits immeubles, et soit qu'ils soient propres, acquêts ou conquêts, *sans aucune réserve, restriction et limitation*, non-obstant toutes lois, coutumes et usages à ce contraires: Pourvu néanmoins, que le testateur ou la testatrice, étant conjoint ou conjointe par mariage, ne pourra tester que de sa part des biens de sa communauté ou des biens qui lui appartiendront autrement, ni préjudicier par son testament au droit du ou de la survivante, ou au douaire coutumier ou préfix des enfants: Pourvu aussi, que le droit de tester, tel que ci-dessus spécifié et déclaré, ne pourra être considéré s'étendant à donner pouvoir de léguer et donner par testament ou ordonnance de dernière volonté, en faveur d'aucune corporation ou autres gens de main morte, excepté dans les cas où telle corporation ou gens de main morte auront la liberté d'accepter et recevoir suivant la loi."

Ce statut proclame la liberté illimitée de tester; et en fait d'incapacités de recueillir par legs, soit absolues, soit seulement relatives, il établit pour règle générale qu'il n'y en aura plus, à l'exception d'une seule qu'il laisse subsister;

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(1) 41 Geo. III. Ch. 4, Sec. 1.



et cette exception ne fait que donner une plus grande sanction à la nouvelle règle qu'il décrète.

Le testament fait la loi de la famille ; et si, par ce testament, une personne a disposé de tous ses biens, tous ces biens sont soumis à cette loi. Si cette personne n'a fait aucune donation préalable entre-vifs, tous ses biens sont dévolus à titre de succession testamentaire, succession qui doit être recueillie et gouvernée par les dispositions de dernière volonté du testateur, sans que personne puisse avoir le droit de les changer ou modifier quant à leur effet ou à leur étendue. Le statut donne à toute personne le droit de tester de *tous* ses biens, quels qu'ils puissent être, soit en faveur de son conjoint, soit en faveur de l'un ou de plusieurs de ses enfants à son choix, ou *en faveur de qui que ce soit*, et cela *sans aucune réserve, restriction et limitation*. Si, lorsqu'une personne a ainsi disposé par testament de tous ses biens, l'un de ses enfants pouvait encore, à l'aide de quelques textes de la Coutume de Paris, limitatifs du droit de disposer, réclamer une détraction sur ces mêmes biens, soit à titre de légitime ou à autre titre, le statut de 1801, serait *nullifié*, serait *un non-sens*. Au moyen de la diminution que ce droit de détraction aurait l'effet de produire, le testateur n'aurait pas pu de fait disposer de *tous* ses biens, *sans réserve, restriction et limitation*. Néanmoins le statut lui en donne la faculté. Donc toutes les lois antérieures, contraires à l'exercice de cette faculté, ont été abrogées par ce statut.

J'ai déjà fait remarquer que, dans le système d'argumentation des appelants eux-mêmes, la réserve des quatre quints des propres avait été abolie par le statut de 1774. Or à quelle autre *réserve, restriction et limitation*, peuvent s'appliquer ces mots du statut de 1801, si ce n'est avant tout, et principalement, au droit de légitime de l'art. 298 de la Coutume de Paris. La légitime est une *réserve* aux termes mêmes de l'un des textes de la Coutume ; " la légitime *réservée* aux autres," dit l'art. 307 ; et nous lisons dans

MERLIN, Rép. au mot " Réserve," " Nous entendons, par cette expression, une portion de biens déclarée indisponible par le code civil, en faveur de certains héritiers. En consultant les articles *légitime* et *portion disponible*, on pourra se former une idée de l'ancienne législation relative à la *réserve*, qui était alors connue sous le nom de *légitime*, tant dans les pays de droit écrit que dans ceux de coutume." Donc la *légitime* dans la Coutume de Paris, était une *réserve* ; donc le mot " réserve, dans le statut de 1801, s'applique à la *légitime*, et ce, d'autant plus, 1o. que les appelants reconnaissent eux-mêmes que l'acte de 1774 avait déjà fait disparaître la *réserve* des quatre quints des propres ; 2o. que, si le douaire coutumier doit être considéré comme *réserve*, il fait l'objet d'une exception dans le statut de 1801 ; or, cette *réserve* étant la seule que le statut laisse subsister, donc il a eu l'intention d'abolir, et a en effet aboli, toutes les autres *réserves*, entre autres celle de la *légitime*. Donc, dans une succession testamentaire, il ne peut y avoir lieu à la *légitime* de la Coutume de Paris, puisque l'exercice de ce droit de *légitime* aurait l'effet, par la détraction qu'il entraîne sur les biens d'un testateur, de priver ce dernier de la faculté de disposer de *tous* ses biens comme il le veut et l'entend, faculté que, néanmoins, le statut de 1801, explicatif de celui de 1774, a eu non seulement l'intention de lui donner, mais qu'il lui donne en termes exprès.

Remarquons encore qu'aux mots *sans réserve*, le statut de 1801 ajoute, *sans restriction et limitation*. Donc, le législateur a voulu donner à toute personne, capable de disposer par testament, une liberté illimitée de tester de tous ses biens. Ce serait, néanmoins, contrevenir à l'exercice de cette liberté, si l'un des enfants du testateur pouvait encore, nonobstant la loi portée dans ce testament, réclamer, à titre de *légitime*, une portion de ces mêmes biens, et par conséquent diminuer à son gré, les forces de cette succession testamentaire. En effet la *légitime* n'est qu'une quote part des biens, et non de l'hérédité. (1)

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(1) Merlin, vbo. *Légitime*, Sect. 2 § 1.

Mais l'on dira ; la Coutume de Paris a établi le droit de légitime non pas seulement pour le cas où le défunt a fait des dispositions testamentaires, mais encore pour celui où il a fait des donations entre-vifs, qui, par leur excès, diminuent ou anéantissent la portion à laquelle on avait un droit légal. (1) Or les statuts de 1774 et de 1801 n'ayant trait qu'aux donations testamentaires, et non aux donations entre-vifs, l'on prétend que celles-ci continuent d'être assujéties à la détraction de la légitime, et que, dans le cas actuel, la dite Angélique Favreau ayant donné entre-vifs, presque tous ses biens aux défendeurs, les appelants sont bien fondés à leur demander leur légitime.

Il est vrai que les statuts de 1774 et de 1801 ont eu principalement pour objet la liberté de tester, et qu'il ne parlent pas en termes exprès de celle de disposer par donation entre-vifs. Néanmoins, la liberté de donner tous ses biens par acte entre-vifs existait déjà sous l'autorité de l'art. 272 de la Coutume de Paris. Ce droit est reconnu par le mot " donations " que l'on trouve dans ce passage de l'acte de 1774, " toute personne qui aura le droit d'aliéner les dits immeubles, meubles ou intérêts pendant sa vie, par ventes, donations, ou autrement." C'était la faculté de tester qui était restreinte, et non celle de disposer entre-vifs. Le législateur de 1774 et de 1801 en faisant disparaître les restrictions à la première, a évidemment voulu mettre ces deux difficultés sur le même pied, et leur faire produire les mêmes effets. Il n'y a pas de raison de prétendre qu'il ait pu vouloir qu'une donation fût à l'avenir plus favorable que l'autre, et que l'une fût soumise à des *réerves* de droit, lorsque l'autre ne le serait pas. L'intention de la nouvelle loi est que l'on respecte la volonté de celui qui dispose de ses biens, que cette volonté s'exerce librement et sans entrave aucune. Or cette volonté est toujours censée plus libre dans un acte entre-vifs que dans un testament qui sou-

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(1) Merlin, vbo. *Légitime*, Sect. 4.

vent est suggéré, ou arraché à la faiblesse d'une personne mourante.

Si donc le législateur de 1774 et 1801 a voulu que la donation testamentaire ne fût plus soumise à la détraction de la légitime, et cela, dans mon opinion, résulte pleinement des termes du Statut de 1801, il me semble que la raison qui lui a fait porter ce décret doit nous faire supposer qu'il a eu la même volonté à l'égard de la donation entre-vifs.

Ceci paraîtra plus évident, si l'on considère quels seraient les effets de la nouvelle législation, dans le système qui continuerait de soumettre au retranchement les donations entre-vifs pour la légitime des enfants, tandis que les biens recueillis par succession testamentaire n'y seraient pas sujets.

“ Les donations entre-vifs ” dit Pothier, (1) “ ne peuvent souffrir de retranchement pour la légitime des enfants du donateur, que lorsque ce sont elles qui y ont donné atteinte ; et on ne peut dire qu'elles y aient donné atteinte, que lorsqu'il ne se trouve pas dans les biens que le donateur a laissés, même dans ceux dont il a disposé par testament, de quoi la remplir, car s'il se trouve dans ce bien de quoi la remplir, il est vrai de dire que ce sont les dispositions testamentaires, et non les donations entre-vifs, qui y ont donné atteinte ; puisque, si le donateur n'eût pas fait ces dispositions testamentaires, il y aurait eu, malgré la donation, de quoi remplir la légitime ; et que la donation étant irrévocable, et ayant son effet du jour de sa date, il n'a pas dû demeurer au pouvoir du donateur d'y donner atteinte par des dispositions testamentaires ; ce qui arriverait néanmoins, si ces dispositions testamentaires ne devaient être épuisées entièrement pour la légitime des enfants, avant qu'on pût attaquer les donations entre-vifs. Cela a lieu, quand même le testament

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(1) Don. Entre-vifs, Sec. 3, Art. 5, § 5, p. 294, ed. 12a.

aurait été fait avant la donation ; car il n'est pas plus permis au donateur de donner atteinte à sa donation, en conservant un testament précédemment fait, que d'y donner atteinte par un testament qu'il ferait depuis, les testaments, en quelque temps qu'ils soient faits, n'ayant d'effet que depuis la mort du testateur, ils ne peuvent donner atteinte aux donations entre-vifs, qui ont effet du jour de leur date."

" Suivant ces principes, lorsqu'après toutes les dettes acquittées, même après avoir pris ce qui était nécessaire pour remplir les enfants héritiers de ce qui leur restait dû par le défunt, s'il ne reste pas dans les biens, dont le défunt a disposé, de quoi remplir la légitime de quelqu'enfant, elle doit se prendre d'abord sur les légataires universels, qui doivent la fournir avant les légataires particuliers, car ils ne sont légataires que de ce qui reste après les legs particuliers acquittés ; ensuite tous les légataires particuliers y doivent contribuer, chacun au sol la livre de leur legs : car tous les legs n'ayant d'effet que du jour de la mort du testateur, ils sont censés avoir une même date ; et aucun ne peut avoir d'avantage sur l'autre ; les légataires pour cause pie n'ont pas même à cet égard plus d'avantage que les autres."

" Si, après que tous les legs ont été épuisés, il manque encore quelque chose à la légitime de l'enfant à qui elle est due, il peut demander ce qui en manque aux donataires entre-vifs, en commençant par celui qui est le dernier en date."

" Les donations antérieures ne peuvent souffrir de retranchement pour la légitime, que les postérieures ne soient épuisées ; car tant qu'il reste de quoi les remplir dans ce qui a été donné postérieurement, il est vrai de dire que ce ne sont pas les donations antérieures qui y ont donné atteinte."

L'on voit que la nouvelle législation est entièrement con-

traire à l'ancienne. Une donation entre-vifs, si elle doit continuer d'être assujettie à la détraction de la légitime, devra de suite subir cette détraction, bien que le donateur ait laissé, dans sa succession testamentaire, à des légataires universels ou particuliers, des biens plus que suffisants pour fournir la légitime. Ce ne serait plus subsidiairement, mais en premier lieu, que le légitimaire attaquerait la donation entre-vifs. La position du donataire ne serait donc plus celle que lui avait faite la Coutume de Paris, et si elle est changée, c'est parce que la loi sur la matière l'a été aussi. Je pense donc que ne pouvant y avoir, d'après la nouvelle législation, de légitime sur les biens donnés par testament, il ne doit pas être permis de la prendre en pareil cas sur ceux donnés entre-vifs. On peut encore dire qu'on doit présumer que la volonté du père ou de la mère, qui fait un testament disposant de tous les biens qu'il laissera, a été que ses enfants n'eussent pas de légitime ni sur ces biens, ni sur ceux donnés auparavant entre-vifs. S'il en devait être autrement, c'est-à-dire si, dans ce cas, la donation entre-vifs devait subir la détraction de la légitime, la conséquence serait qu'un donateur qui aurait à laisser à son décès assez de biens pour fournir la légitime sans que le donataire entre-vifs fût exposé à être troublé à cet égard, pourrait néanmoins, en faisant un testament, changer l'effet de la donation entre-vifs en assujettissant par cela même le donataire à un retranchement. Tel serait le résultat inévitable dans l'hypothèse que j'ai posée ; résultat qui non-seulement est loin d'avoir été prévu par le législateur de 1774 et 1801, mais qui est tout-à-fait contraire au but et à l'esprit de sa loi.

On nous a cité deux causes, l'une décidée par la Cour du district des Trois-Rivières, en 1821 (Houde vs. Duval) et l'autre décidée à Montréal en 1849 (No. 2121 Lefebvre et ux. vs. Boyer) (1) dans lesquelles le droit de légitime a été reconnu. Dans la première, la défense ne souleva pas la question, et dans la seconde, la cour déclara qu'il n'y

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(1) 1st vol. L. C. Jurist. p. 267.

avait pas lieu d'accorder la légitime, la donation étant regardée comme onéreuse, et n'ayant de donation que le nom.

Je dois faire remarquer que, dans l'une et l'autre causes, on ne représentait pas de testament des donateurs; et je dois ajouter que, quoique j'aie exprimé ci-dessus l'opinion que, même dans un tel cas, l'esprit de notre nouvelle législation est de ne pas admettre le droit de légitime, la question ne laisse pas néanmoins que de souffrir des doutes.

Jugement confirmé.

CHERRIER, DORION et DORION, pour les appelants.

OUIMET, MORIN et MARCHAND, pour l'intimé.

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**BANC DE LA REINE, } DISTRICT DE MONTRÉAL.  
EN APPEL.**

Présents :—Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef,  
AYLWIN, DUVAL et CARON, Juges.

LAROCQUE *et al*, ..... *Appelants.*  
et

THE FRANKLIN COUNTY BANK, ..... *Intimés.*

Jugé :—1o. Qu'une corporation établie en pays étrangers peut poursuivre dans le Bas-Canada le recouvrement de ce qui lui est dû.

2o. Que sur poursuite pour recouvrement du montant d'un billet fait pour valeur reçue, le porteur n'est pas obligé de prouver que telle valeur a été donnée.  
(1)

Held :—1o. That a corporation duly constituted in a foreign country may proceed for the recovery of its debts in Lower Canada.

2o. That upon action brought for the recovery of the amount of a promissory note made for value received, the holder of such note need not prove that value was given.

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Jugement rendu le 1er juin, 1858.

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef.—Les quatre défendeurs Hector Larocque, Frs. Lamoureux, Julien Lamoureux et Joel Hamilton, le 7 janvier 1856, à Henryville, dans le Bas-Canada, font et signent le billet suivant :

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(1) 12 Vict. c. 22, sec. 3.

" For valu received we jointly and severley promise to  
 " pay the Franklin County Bank in St. Albans, Vt. eleven  
 " hundred dollars,  $\frac{1}{2}$  in fifteen dayes from date and the re-  
 " mainder in twenty dayes from date."

Hamilton a ajouté à sa signature les mots suivants:  
 " *Surty for the 3 above siners.*"

La banque les a poursuivis pour la balance de ce billet,  
 savoir: £222 12s.

Les trois premiers défendeurs ont plaidé qu'ils n'avaient  
 consenti le billet que pour l'accommodation de Hamilton,  
 sans avoir reçu aucune considération ou valeur, ni de lui  
 ni de la banque; que ce n'est que depuis la dernière  
 échéance que le billet a été transporté à la banque par Ha-  
 milton, en fraude des autres défendeurs; que, dans le cas  
 même où la demanderesse aurait, après échéance, donné  
 valeur pour le dit billet, elle n'a pu le faire au préjudice  
 des droits des défendeurs contestants, et de ce qui pouvait  
 exister entr'eux et le dit Hamilton; et que dans le cas où  
 la demanderesse aurait été propriétaire du dit billet, elle  
 s'en était dessaisie, et l'avait remis à Hamilton " lequel en  
 " aurait été, depuis l'échéance, en possession, l'aurait  
 " exhibé comme tel aux défendeurs (contestants), lesquels  
 " auraient des droits et comptes avec Hamilton dont la  
 " banque ne serait que le prête-nom."

La Cour Supérieure a, par son jugement du 30 septembre  
 1857, condamné les défendeurs à payer à la banque la  
 susdite somme de £222 12s. De ce jugement les trois pre-  
 miers défendeurs ont interjeté appel.

Sur la question de fait, je crois que la Cour de première  
 instance en est venue à une conclusion exacte. Outre qu'a-  
 vant la dernière échéance, le billet était en la possession  
 de la banque, et que, même avant cette échéance, elle avait  
 reçue à compte \$164, le billet est fait payable à la banque  
 elle-même, et elle en est le porteur. Quant à la prétention



que les défendeurs n'ont reçu aucune valeur, il suffit de leur rappeler le dispositif de la 3e section de l'acte de 1849, ch. 22, qui porte " que, lorsque dans le corps d'un billet " promissoire ou lettre de change, les mots "*valeur reçue*" " seront mentionnés, valeur sera censée avoir été reçue sur " le dit billet ou lettre, ou endossement, pour le montant " spécifié."

Les autorités citées, même par les appelants, établissent qu'une corporation étrangère est admise à poursuivre comme telle. Les 6e et 7e sections de notre statut provincial de 1853, (1) comportent une reconnaissance de ce droit. Elles supposent le cas d'une poursuite faite au nom d'une corporation étrangère, à l'occasion de laquelle on produit un document attesté en la forme voulue pour preuve de son existence. Le statut déclare d'un côté que ce document fera preuve *primâ facie*, mais permet, de l'autre côté, à la partie adverse d'en nier la vérité, " et de ce faire par écrit avant " la clôture de l'enquête de la part de la partie qui le produira, &c." Il me semble que c'est là reconnaître formellement le droit d'une corporation étrangère de poursuivre devant nos tribunaux.

La prohibition portée contre les banques étrangères par la 5e section du statut de 1850, (2) ne peut pas être interprétée comme entraînant avec elle la négation du droit de poursuivre en ce pays. Cette prohibition est en ces termes : " Aucune banque incorporée ou ayant son principal bureau, " ou le siège de ses affaires, dans un pays en dehors des " possessions de Sa Majesté, n'ouvrira, ni ne tiendra un " bureau ou lieu d'escompte ou dépôt, ou pour l'émission, " mise en circulation ou rachat de ses billets dans cette province, à peine d'une amende de £100 pour chaque jour " où ce bureau ou lieu sera ouvert ou tenu ouvert."

Cette disposition ne fait aucune allusion au droit d'une banque étrangère de poursuivre. Elle n'ôte ni ne donne ce

(1) 16me Vic. ch. 193.

(2) 13me et 14me Vic. ch. 21.

droit. S'il existait auparavant, elle le laisse donc subsister. S'il n'existait pas, la clause prohibitive dont il s'agit, devenait sans but pratique. Quelle banque étrangère serait venue établir un bureau ici, si elle n'eût pas eu le droit de poursuivre devant nos tribunaux. Du reste, le statut postérieure à cette prohibition, celui de 1853 déjà cité, prouve que ce droit pré-existait, puisqu'il ne fait les règlements qu'il comporte à cet égard qu'en admettant nécessairement son existence.

La demanderesse, il est vrai, n'a pas produit de copie dûment certifiée de sa charte. Cette production n'était nécessaire que pour faire la preuve de son existence, dans le cas où elle n'aurait pas d'autres moyens de l'établir. Mais les appelants eux-mêmes l'ont dispensée du trouble de faire cette production, puisqu'ils lui ont donné en Cour de première instance une admission par écrit. "*That the plaintiff was and still is a body corporate and politic doing business as such as alleged in said declaration.*" Or, dans cette déclaration, la demanderesse s'intitule: "The Franklin County Bank, a body corporate and politic, duly incorporated by the laws of the state of Vermont, one of the United States of America, and doing business as such at the town of St. Albans, in the State of Vermont aforesaid;" puis le premier chef allègue "*that at all and every the time and times hereinafter mentioned the said plaintiff was and is a body corporate and politic as aforesaid,*" ce qui comprend le temps où a été souscrit le billet en question, lequel, en outre, a été fait en faveur de la dite banque elle-même.

Pour ces raisons la Cour confirme le jugement dont est appel. (1)

LAFLAMME, LAFLAMME et BARNARD, pour les appelants.

DORMAN, W. pour l'intimé.

(1) Autorités citées par les appelants.

Story, Prom. Notes, pp. 2, 215 :—Grant on Corporations p. 50 :—Holscomb's Leading Cases on Com. Law, p. 141

Autorités des intimés.

Bayley on Bills, p. 3 :—Chitty on Bills, p. 557 :—Story, Prom. Notes, sect. 9, sect. 181 :—Byles on Bills, p. 28 :—Story, Prom. Notes, secs. 186, 57, 58, 466 :—Chitty on Bills, pp. 84-5 :—Bayley on Bills, pp. 501-2.

## IN THE CIRCUIT COURT.—QUEBEC.

Before :—MEREDITH, Justice.

WOOD,.....*Petitioner.*

VS.

HEARN,.....*Respondent.*

Held:—1o. That the statute law of Lower Canada being silent upon the subject, "bribery" in municipal elections has not the effect of annulling the votes of the persons bribed, nor of disqualifying the person by whom they were bribed.

2o. That the respondent cannot, by means of a special answer, be called upon to answer charges not specified in the petition (*requête libellée*) filed under the 12th. Vic. ch. 41, sec. 3.

3o. That the petitioner having prayed for a judgment upon the right of one Thomas McGreevy to the cont sted office of city councillor, the defendant had the right to raise an issue to try the right of the said McGreevy to hold the said office, and to shew that his claims were unfounded.—The whole upon demurrer.

Jugé: 1o. Que les lois du Bas-Canada ne statuant pas quant à la "corruption" en fait d'élections municipales, telle corruption n'a pas l'effet d'annuler les votes obtenus par ce moyen, ni de disqualifier la personne qui a obtenu tels votes.

2o. Que l'intimé ne peut pas, au moyen d'une réponse spéciale, être contraint de répondre à des faits qui ne sont pas allégués dans la requête filée en vertu de la 12me. Vic. ch. 41, sec. 3.

3o. Que le requérant ayant conclu à un jugement quant au droit d'un nommé Thomas McGreevy à l'office de conseiller municipal, le défendeur était en droit de révoquer en doute le droit du dit McGreevy de retenir le dit office, et de démontrer que ses prétentions étaient mal fondées.—Le tout au moyen d'une défense au fonds en droit.

Judgment rendered the 14th. May, 1858.

The petition presented in the case against the seat of the respondent, as city councillor for Montcalm Ward, in the city of Quebec, alleged, that his return had been obtained through fraud, that a number of certificates of duly qualified electors, who, it was alleged in the petition, intended to vote for one Thomas McGreevy, the opposing candidate, and whose names were given in the petition, had been surreptitiously and fraudulently obtained by persons who afterwards fraudulently personated the qualified electors mentioned in the certificates, and voted by means thereof for the respondent, and had by this means procured the undue return of the respondent, instead of the said McGreevy, who had the majority of legal votes in the said ward. The petition concluded by praying for the ejection of the respondent from the said office, and for a judgment upon the right of the said McGreevy thereto.

The respondent pleaded that the majority of legal votes in the ward had been recorded for him, and that if any votes whatever had been given for the said McGreevy, they were obtained by the "bribery" and corruption of the said McGreevy and his agents, who paid large sums of money, and made promises of employment, and held out other large rewards and inducements to the electors, and had by such means induced the said electors to vote for him, and which votes were consequently illegal and invalid; and further, that no legal votes whatever had ever been given in favor of the said McGreevy, and that the respondent had been and was duly elected by the majority of legal votes in the said Ward.

The petitioner replied specially, repeating the allegations in his petition, and further alleging that the respondent had procured the votes of the electors by corruption, by reason whereof he was not eligible and was disqualified to hold the said office of city councillor. The petitioner also demurred to the plea, principally upon two grounds;

1stly. That bribery and corruption did not disqualify the person bribing from holding the office of city councillor, nor render void or voidable the vote of the elector corrupted or bribed, by any law in force in this province.

2dly. That the respondent could not, in answer to the petition, raise an issue whereby the right of McGreevy to hold the said office could be tried.

The respondent demurred to the special answer of the petitioner, upon the ground, amongst others, that it contained an allegation charging the respondent, as a ground of disqualification for the office in question, with having obtained the votes of the electors by means of corruption, and that this charge had not been specified or preferred in the petition filed in the cause; and that, consequently, this portion of the special answer must be expunged, as it was incompetent to the petitioner, in a special answer, to call

upon or compel a respondent to answer new charges, other than those contained in the declaration or petition to which he had been called upon to plead, and to which he had in fact pleaded.—That the course of pleading was prescribed and limited by law, and if new matter were allowed to be urged in a special answer, the respondent would be prevented by law from replying thereto, and that such a course was therefore contrary to the spirit and letter of the law; and moreover, that the petitioner had alleged in his demurrer that corruption and bribery were no ground of disqualification to the office in question.

It was upon these two demurrers that the following judgment was pronounced.

MEREDITH, Justice.—In this case a question of general importance is raised; it is as to whether bribery annuls the votes of municipal electors who are bribed, and disqualifies the person bribing them. It is admitted, on both sides, that our statute law is wholly silent on the subject; and notwithstanding the great care and attention with which this case has been conducted, no English case has been cited establishing that the election of a member of a corporation can be annulled on the ground of bribery. I have myself looked through all the books within my reach, and have not been able to find any such case, or any authority even tending to establish that, under the common law, the election of a councillor or alderman can be set aside on the ground of bribery.

The most important english case as to the point under consideration, is the case of *The Queen vs. The Mayor and Aldermen of Norwich*.

In that case a *mandamus* was obtained to admit one Dunch, alderman of Norwich.—The mayor and aldermen returned that Dunch was elected member by the ward, but was refused by the mayor and aldermen because he had *not qualified* himself according to the corporation act;—that

he had procured his election by bribery, and then at the end of the return they added, *quod non fuit electus*.

Upon the argument of the case chief justice Holt said, "that as to his procuring his election by bribery, it would be a question whether that would make his election void, unless it were to an office within the statute of Edward VI, (1) for though elections *ought to be free*, yet, an elector might use his liberty to vote for him that had given him "money." (2)

This dictum of chief justice Holt is referred to in all the leading treatises on this subject, without being controverted, or any conflicting case cited. (3)

It must therefore, I think, be admitted, that there are, at least, no authorities which would justify me in saying that under the English *common law* I could legally declare the election of a city councillor null for bribery. Such being the case, and our own statute law being silent on the subject, I think I ought not to do so, for I cannot pronounce a disqualification which the law has not pronounced.

By the 54th. section of the english statute which provided for the regulation of municipal corporations in England and Wales, any person taking or giving a bribe on any of the cases mentioned in that section is subjected to a penalty of £50, "to be recovered by action of debt or information in any of Her Majesty's Courts of Record at Westminster, and any person offending in any of the cases aforesaid, being *lawfully convicted*, shall for ever be disabled to vote in any election in such borough, or in any municipi-

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(1) This act does not extend to the colonies. Hawkins 1 vol. p. 416 :—Jacob's Law Dictionary vol. 1. p. 369 :—2 Salkeld, p. 417 :—2 Lord Raymond 1245 :—49, Geo. III. c. 126.

(2) Lord Raymond's Repts. 1244.

(3) Tidd on Corp. vol. 2. p. 389 :—Woolrich, on Corporations, p. 218, sect. 554, says, "It seems to be doubtful whether bribery will avoid the election of an alderman, for not being within the statute 5 and 6 Edward VI. c. 16, it is a question left to the doctrine of common law; and the opinion of *Holt, C. J.*, was, that it was not void on that account. But the offering of such a bribe is the proper subject of "an indictment or criminal information."

“pal or parliamentary election whatever, in any part of the United Kingdom, and also shall for ever be disabled to hold, exercise, or enjoy any office or franchise to which he then shall, or at any time afterwards may be elected as a burgess of such borough, as if such person was naturally dead.” Under this provision of law, which although very severe, is not more so than I think it ought to be, it is evident that the councillor or other official, guilty of bribery, must be lawfully convicted of that offence before it could be made the ground of ousting him under a writ of *quo warranto*. (1)

This provision of law is also of importance as showing that the imperial parliament have deemed it necessary to make express legislative provision for the disqualification of persons guilty of bribery at municipal elections. We also know that the same parliament, and our own parliament have followed the same course with respect to bribery at parliamentary elections, and it appears to me that there is the same necessity for legislation with respect to bribery at our colonial municipal elections, and that the judges acting upon general principles, and of their own mere authority cannot treat municipal elections, in relation to which there is no statutory disqualification for bribery, in the same way as parliamentary elections, in relation to which there is a statutory disqualification, are treated.

It must not, however, be supposed, that such bribery, even under the law as it stands, can be committed with impunity. On the contrary, it is well settled, “that it is illegal to bribe persons either by giving money or promises to vote at elections of members of corporations created for the sake of public government, and that for that offence an information will lie.” (2) And, indeed, this consideration greatly added to the difficulty which I

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(1) Grant 233:—9 Ev. p. 43.

(2) Lord Raymond Rep. 1379:—1 Deacon 162:—4 Pet., at 688:—2 B and Ad p. 13.

have felt in disposing of this case, for it seems unreasonable to hold, that a man may secure an important public office by committing a number of illegal acts. It may, however, be observed that even where there is bribery, the act of voting is distinct and separate from the receiving of the bribe, and that although any given number of voters may have been bribed, and may have voted for the person bribing them, yet, it does not follow, that all the persons who so voted did so because they were bribed. On the contrary, it would be possible that all of them, and, under ordinary circumstances, it would seem probable that some of them would have voted exactly in the same way, even if they had not been bribed. Now, without express legislative authority, a court of justice would not be justified in annulling the whole of a number of acts, legal in themselves, where there could be no certainty that all of these acts, so legal in themselves, or even that most of them, were the consequence of other illegal acts.

For these reasons, after giving to the subject much attention, I have come to the conclusion that in the silence of our law on the subject, and in the absence of any thing to justify such a course, I cannot hold that bribery in municipal elections has the effect of annulling the votes of the persons bribed, and of disqualifying the person by whom they were bribed.

If, as I believe, our provincial legislation is in this respect deficient, however much we may regret the state of the law, it is more fitting that what is wanting should be supplied by the action of the legislature, than by judge made law.

As to the second question raised in this case, which is, as to whether the defendant can, by means of a special answer, be called upon to reply to any charges not specified in the *requête libellée*. I may at once say that I am of opinion that he cannot.



It is true that according to the practice which formerly obtained in England this could have been done ; but this has been changed. By the rule of practice referred to by *Cole* (p. 218) it is declared " whereas much vexation and " expense have been occasioned to defendants in informa- " tions in the nature of *quo warranto*, by the practice of rais- " ing issues upon various matters distinct from the ground " upon which information was granted by the Court ; now " for providing a remedy in this behalf, it is ordered, that " from henceforth, the objections intended to be made to " the title of the defendant shall be specified in the rule " to shew cause, and that no objections not so specified " shall be raised by the prosecutors on the pleadings " without the special leave of the Court, or of some Judge " thereof." (1)

I think our legislature in order to avoid the vexation and expense referred to in the english rule, have, by our statute on the subject, established a practice similar to that which in England obtains under the rule of court above cited.

Our statute limits the number of pleadings to be filed, and declares that within three days from the filing of the plaintiff's answer or *replication*, " the plaintiff shall proceed to " adduce evidence in support of the allegations contained " in his said declaration or petition, *requête libellée*." I think it would be contrary, not only to the letter, but to the spirit of our law to allow a plaintiff, by means of allegations not sworn to, in a special answer, to attack the title of the defendant, upon other grounds than those sworn to, as required by law, in the petition to which the defendant is required to answer. It is an inflexible rule in ordinary cases, " that " a special answer can set up nothing in aid of the declaration but only in avoidance of the defendant's plea." (2)

(1) 6 B and C, 267 ;—9 D and R, 247.

(2) Montreal 1861 *Ray vs. Gagnon*, see also *McGoey vs. Griffin L. C. Jurist* p. 39.—Held :—" That allegations which form the chief support of plaintiff's action " must be set out in the declaration, and cannot be pleaded by way of special answer " to defendant's exception."

And I think there is, to say the least, quite as much reason for observing this rule, in cases under the statute respecting writs of prerogative, as there is in ordinary cases. This ground alone would suffice to cause the rejection of the second and third of the answers of the petitioner.

Another point of importance raised in this cause is as to whether in answer to the *requête libellée*, the defendant can raise an issue whereby the right of Thomas McGreevy to hold the office in dispute may be tried. The fourth ground of demurrer urged by the petitioner is ;—" Because the right " of the said Thomas McGreevy cannot be tested or adjudicated upon in this cause."

Now if it be true that a judgment rendered in this cause would not be conclusive as regards McGreevy ; still as the petitioner has by his petition prayed, as he had a right to do, " that a judgment be rendered (in this cause) upon the right " of the said Thomas McGreevy thereto (that is to the said " office) " the opposite party must, as a necessary consequence, have a right to shew that the claims of Thomas McGreevy are unfounded. The prayer of the petitioner for a judgment upon McGreevy's right, and the pretensions in the demurrer that we cannot adjudicate upon that right, are inconsistent with each other, and the Court would virtually consent to be led blind folded were it to allow the petitioner to maintain the right of McGreevy to the office in controversy, and, at the same time, refuse to allow the defendant to resist the pretensions of the petitioner in that respect. I therefore overrule the 2nd., 3rd. and 4th. grounds of demurrer urged by the petitioner.

STUART and VANNOVUS, for petitioner.

POPE, THOS., for respondent.

QUEEN'S BENCH, }  
 APPEAL SIDE. } DISTRICT OF QUEBEC.

Before :—Sir L. H. LAFONTAINE, Baronet, Chief-Justice,  
 AYLWIN, DUVAL and CARON, Justices.

TREMBLAY,..... (*Plaintiff*) *Appellant*.  
 and  
 NOAD *et al*,..... (*Intg. parties*) *Respondents*.

Held :—That, in the case submitted, the respondents were in possession of the effects seized by the appellant, as of and belonging to the defendant, and that, therefore, the seizure effected under the writ of *saisie-arrest* issued in the cause was null and void.

Jugé :—Que, dans l'espèce, les intimés étaient en possession des effets saisis par l'appellant comme appartenant au défendeur, et que, par conséquent, la saisie pratiquée en vertu du writ de *saisie-arrest* émané dans la cause était nulle.

Judgment rendered the 12th. June, 1858.

The action began in the Court below by a *saisie-arrest*, in virtue of which the appellant seized, as of and belonging to the defendant,

361 Barrels of Herrings,  
 26 Kegs of Herrings, and  
 43 Barrels of Oil.

The seizure was made under the following circumstances :—The appellant, owner of the schooner *Marie Louise*, through the agency of Lavoie, the captain of the schooner, by notarial agreement, duly executed, covenanted with the defendant to let him have the use of the said schooner, together with the services of her Captain and crew, on a voyage to the coast of Labrador and back to Quebec, for the sum in the deed stipulated. The defendant loaded the schooner, and she proceeded along the coast of Labrador, where the defendant disposed of his cargo, and at different places on the coast took in a cargo of fish and oil, and returned therewith to Quebec, the captain and crew being on board all the voyage, according to agreement. Upon the return of the schooner to Quebec, and as soon as she began to discharge her cargo, the appel-

lant also arrived in Quebec, and opposed the further discharge of the cargo until he should have been paid for the use and services of his schooner and crew. Thereupon the defendant requested the appellant to accompany him to the office of the respondents, where he requested them to pay the appellant; Noad, one of the respondents, said, "that he would give the appellant £100 0 0 the following morning, and that the remainder would not go far." The appellant thereupon permitted the discharge of the cargo to be continued, and on the afternoon of the following day, caused the seizure to be made of the portion above mentioned, which still remained upon the wharf. The respondents here intervened, alleging, that at and before the seizure they were lawfully possessed as proprietors of all the fish and oil seized, and that the same never at any time belonged to or was the property of the defendant. The appellants replied by a *défense en fait*, upon which issue was joined. The evidence concerning the property in the fish and oil was conflicting; the appellant's witnesses stating, that the defendant purchased them or obtained them by barter in exchange for the goods or cargo which he had taken down to Labrador, and that he had sold a portion of them; while the respondent produced bills of lading and letters of advice for a portion of the fish and oil, by which it appeared that they had been consigned to them, the respondents, by the shippers at Labrador, while the defendant himself swore that they belonged to and were the property of the respondents, and never belonged to him, but were carried by him from Labrador to Quebec, for the respondents, and were in their actual possession at the time of the seizure.

The Court below rendered the following judgment:—

"The Court &c., considering that it is well and sufficiently established by the evidence of record, that, at and before the seizure in this cause made at the instance of the plaintiff, by virtue of a writ in this cause issued, of the

“ merchandize specified in the procès-verbal de saisie, as be-  
 “ longing to the said defendant, the said merchandize men-  
 “ tioned in the intervention of the intervenants in this cause  
 “ filed, to wit, fifty-eight barrels of herrings, sixteen kegs  
 “ of oil, twenty-three barrels of oil, twenty-six half barrels  
 “ of herrings, two hundred barrels of salted fish, fifty-three  
 “ other barrels of salted fish, four barrels of oil, and fifty  
 “ other barrels of salted fish, was not the property of the de-  
 “ fendant, and that the defendant had no legal claim thereto ;  
 “ and considering that the contestation raised by the plain-  
 “ tiff, to the said intervention of the said intervenants, hath  
 “ not been established, and that the said intervening parties  
 “ have established the material allegations of their said in-  
 “ tervention,—the Court therefore maintains the said inter-  
 “ vention, and declares the said intervenants to be the lawful  
 “ proprietors of the said oil, herrings, salted fish and bar-  
 “ rels, and in consequence grants *main levée* thereof, and  
 “ orders and directs the sheriff of the district of Quebec to  
 “ restore and deliver up the same to them the said interve-  
 “ nants. And the Court dissolves the attachment made, in  
 “ so far as it relates to the said merchandize, and declares  
 “ the said attachment to be null and void, the whole with  
 “ costs to the said intervenants against the plaintiff who  
 “ contested the said intervention.”

It was from this judgment that the appeal was instituted.

LANGLOIS, pour l'appelant, maintint, que le jugement de la  
 Cour Inférieure était erroné parceque lors de la saisie, les  
 intimés n'étaient pas les propriétaires, et n'étaient pas en pos-  
 session des effets saisis. Que l'appelant n'avait fait saisir que  
 les quarts qui se trouvaient encore sur le quai auprès de sa  
 goëlette, et ce, au moment que les intimés se préparaient  
 à les enlever. Que ce n'était qu'après la saisie, et après que  
 H. J. Noad, l'un des intimés, se fût constitué gardien d'iceux,  
 qu'ils les avaient fait transporter dans leurs hangards  
 situés sur un autre quai à une distance de quelques arpents,

et c'était alors, seulement, qu'ils furent comptés. D'après le témoin, des intimés, Murphy, il y avait :—

390 quarts de harengs.

50 demi quarts de harengs.

44 barriques d'huile.

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484 total des quarts reçus par les intimés.

Tandis qu'il n'avait été saisi sur le quai que

361 quarts de harengs.

26 demi quarts de harengs.

43 barriques d'huile.

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430 total de quarts saisis.

Que néanmoins, près de 700 quarts avaient été apportés à Québec, au bord de la goëlette, suivant le témoignage d'Etienne Lavoie, capitaine employé par l'appelant dans ce voyage ; et si l'on ajoute foi à la liste produite avec le témoignage de Joseph Talbot, témoin des intimés, il y en aurait eu les trois quarts.

Que les intimés avaient réclamé toute la quantité saisie, et pour établir leur droit de consignataires à la quantité qu'ils avaient reçue dans leur bangard (484 quarts,) ou bien encore à celle (430) qui avait été saisie sur le quai, ils n'avaient produit des connaissements que pour la quantité de 304½ quarts. Que ces connaissements d'ailleurs n'étaient prouvés que par le défendeur Cyrille Fortier, et encore ne prouvait-il que sa signature au bas d'iceux, sans jurer que ces connaissements avaient été valablement exécutés aux endroits et dates y mentionnés, chose importante ; car les écrits sous seing privé ne faisaient pas foi de leurs dates, et il aurait pu les avoir signés que la veille même du jour qu'il avait déposé. Était-il témoin compétent dans sa propre cause ? c'était une question que l'appelant révoquait en doute. Que quoiqu'il en fût sur la quantité reçue, 484 quarts suivant le témoignage de Murphy, témoin des intimés, il

s'en trouverait 180, et sur celle saisie, il s'en trouverait 125 pour lesquels les intimés n'avaient produit aucun connaissement quelconque. Qu'il était vrai que dans le témoignage de Murphy, il était dit que ce surplus avait été reçu par les intervenants en vertu de lettres d'avis (*letters of advice*) mais elles n'avaient pas été produites, à l'exception toutefois de celle d'un nommé Geuge dans laquelle il était question, seulement, de 34 quarts, et même cette lettre n'avait pas été prouvée. Que si donc la preuve de consignation se trouvait satisfaisante pour cette quantité 304½, mentionnée dans les connaissements produits, elle n'avait certainement pas été faite pour l'excédant.

Qu'il y avait un autre point capital dans la cause ;— Dans le témoignage de Murphy, principal témoin des intimés, et leur teneur de livres, l'on verrait que les intimés avaient payé à Cyrille Fortier, le frêt (£76 3 8) sur les quarts de harengs et d'huile, le 30 octobre 1854, six jours après la saisie faite par l'appelant. D'après les connaissements produits, il n'avait droit de recevoir ces harengs et cette huile que sur le paiement du frêt dû pour le transport d'iceux, ce paiement avait été fait de la manière suivante ;— Fortier leur devait, et ils lui avaient donné crédit sur cette dette pour le montant du frêt (£76 3 8). Point de reçus, ni de Cyrille Fortier aux intimés pour le frêt, ni des intimés à Cyrille Fortier sur sa dette ; le tout étant sans formalités aucunes, et les intimés s'étaient payés eux-mêmes. Néanmoins l'appelant avait des droits acquis sur cette cargaison pour ce qui lui était dû pour l'usage de sa goëlette, et à l'instant de la saisie, ces quarts de harengs et d'huile se trouvaient affectés au paiement de sa créance jusqu'à concurrence de la somme de £76 3 8 due pour leur transport à Québec. Qu'en effet, par la loi, l'appelant se trouvait subrogé de plein droit pour le paiement de ce que lui était dû en vertu de la charte-partie aux droits et privilèges que Cyrille Fortier avait sur la cargaison pour le recouvrement du frêt dû. C'était donc à l'appelant que

cette somme de £76 3 8, devait être payée, et les intimés ne pouvaient plaider ignorance des droits de l'appelant au moment ci-haut mentionnée, car, dès lors, les quarts de harengs et d'huile avaient été saisis à leur connaissance par l'appelant pour conserver le privilège et le lien qu'il avait par subrogation, et les intimés n'avaient réussi à s'en mettre en possession qu'en se portant gardiens à cette saisie. D'ailleurs, les intimés, lors du déchargement, connaissaient les droits de l'appelant, puisque l'un d'eux pour faire continuer la décharge de la cargaison, arrêtée par l'appelant parce qu'il n'était pas payé, lui avait dit qu'il lui payerait le lendemain £100, et le reste de la créance plus tard.

Que l'appelant ne pouvait poursuivre les intimés sur cette promesse parcequ'elle était verbale. Il ne lui restait donc que l'expédient de faire saisir les harengs et l'huile ; mais qu'il invoquait cette promesse des intimés pour expliquer sous quelles circonstances il avait consenti à laisser sortir les quarts de la goëlette, et pour justifier qu'il n'avait pas renoncé au privilège que la loi lui conférait. D'ailleurs, pour l'exécution de son contrat contenu dans la chartepartie, il était tenu de laisser décharger la cargaison. Que c'était de ce moment seul et après que cette condition était remplie, qu'il pouvait exercer son droit d'action pour ce qui lui était dû. Qu'il ne pouvait pas garder au bord de sa goëlette la cargaison, et en même temps intenter son action pour le recouvrement de sa créance ; qu'il devait laisser mettre les quarts sur le quai, savoir : dans un endroit d'où les personnes auxquelles ils appartenaient pussent les faire enlever, après le paiement de ce qui était dû. Mais dira-t-on que du moment que des effets sont débarqués d'un vaisseau et déposés sur un quai ils sont considérés livrés. Oui, sous certains rapports ; mais cette livraison n'est pas tellement parfaite que ces effets puissent être enlevés de l'endroit, avant que le frêt dû sur iceux soit payé. Cette disposition, pour assurer le paiement du frêt, se trouve consignée dans les auteurs qui ont écrit sur le



droit maritime et est conforme à la Jurisprudence. Il va sans dire que, dans l'espèce, l'appelant n'admet pas qu'il y a eu livraison, car il est prouvé que, lorsque ces effets étaient sur le quai, ils étaient spécialement sous la garde de Pierre Lavoie, matelot, dans l'emploi de l'appelant.

Que les droits de l'appelant dans cette cause se trouvaient, sous beaucoup de rapports, semblables à ceux du locateur sur les meubles du sous-locataire. De même que le sous-locataire, dont les meubles ont été saisis pour le loyer dû par celui qui lui a sous loué, ne peut obtenir main levée de la saisie qu'en offrant de payer au locateur principal ce qu'il doit sur sa sous location, ou en prouvant qu'il a payé sans anticipation et sans fraude ; ainsi les intimés, dans l'espèce, n'avaient le droit de revendiquer les dits quarts de harengs et d'huile sous saisie qu'en payant à l'appelant les £76 3 8 qu'ils avaient payés à Cyrille Fortier, après la saisie. Que ce paiement fait à Fortier était fait en fraude des droits de l'appelant ; il n'était donc pas valable et ne pouvait pas être maintenu. Que les intimés devaient donc, en faisant leur intervention, offrir à l'appelant et déposer en Cour pour être adjugée à qui de droit, cette somme de £76 3 8 ; et sans ces offres et consignation ils devaient être déboutés de leur réclamation.

Que, de plus, l'intervention des intimés devait être déboutée parce que les intimés dans leur intervention avaient réclamé à titre de propriétaires les effets saisis par l'appelant, et qu'ils avaient été illégalement reçus à faire preuve à l'enquête que les dits effets leur avaient été consignés, et que les dits intimés n'avaient point prouvé une consignation valable pour tous et chacun des effets réclamés dans leur intervention. Que l'appelant comme propriétaire du vaisseau qui avait apporté à Québec les effets réclamés par les intimés, avait pour le montant qui lui était dû pour le nolisement du dit vaisseau, un lien ou gage sur les dits effets formant sa cargaison, et ce jusqu'à concurrence de la somme qui était due pour frêt des dits effets, et que

les effets, quoique déposés du dit vaisseau sur le quai, n'en pouvaient pas être enlevés par les intimés avant que le frêt dû sur ces effets fût payé à l'appellant. Que l'appellant avait encore son dit lien et gage sur les dits effets lorsqu'il les fit saisir par voie de saisie-arrêt simple sur le quai, et que les intimés, en faisant leur intervention, auraient dû l'accompagner d'offres à l'appellant de lui payer la somme de soixante-et-seize louis, trois chelins et huit deniers, due pour le frêt et transport des dits effets à Québec.

VANNOVUS, for the respondents, contended, that the appellant sought the reversal of the judgment in the Court below upon two grounds,—firstly, that the respondents had failed to prove title,—and second, that the appellant, having a lien on the goods seized, had been deprived of it. That in answer to the first, the respondents could say, that before the seizure they were in actual possession of the goods, and that this fact having been proved, their title to the goods as against the appellant, who pretended to hold property in them, was conclusively established. That if any doubt on this point existed it was completely removed by the testimony of Fortier, who stated that the goods were the property of the respondents, and that they did not belong to him. That notwithstanding this, his creditor, the appellant, insisted upon claiming for Fortier, property which Fortier declared was not his. That a creditor might invoke the right of his debtor but could have no greater rights. That as to the appellant's lien, it could not be considered under the issue which he had raised with the respondents; his mode of proceeding, in the first instance was inconsistent with his pretensions to a lien. He caused a seizure of the goods to be made, as if they were Fortier's, and treated them as belonging to Fortier. If ever he had a lien, or *droit de retention*, his seizure on them, as lawfully in the possession of Fortier, would be a waiver of any such right; to maintain a lien he should have retained possession, and had he been dispossessed illegally, his action was in revendication to recover back the property. That the action brought was to

recover a debt, and an attachment against the estate, generally, of Fortier, was made to preserve that estate to abide the judgment. Under such an attachment the goods seized could not be declared subject to any lien. The seizure being general, the respondents intervened, and in answer to their intervention the appellant did not set up his pretended right of lien; had he done so, by plea, an issue would have been framed upon his right, and the question would, then, have been properly presented for decision. The appellant having neglected to raise that issue was precluded from discussing such right.

That it was further pretended by the appellant, that the respondents were bound to have tendered the freight to him the appellant: The obligation of the respondents to pay freight, was not to the appellant, but to Fortier, and that obligation they had discharged. That with respect to the relations between the appellant and Fortier, the respondents were strangers, knew nothing of them, and were not, in the present case, called upon to inquire into them.

Sir L. H. LAFONTAINE, Bart., Chief-Justice., after reciting the facts of the case, observed, that the question which the Court was called upon to decide was, as to who was in possession of the goods seized at the time of their seizure; that the evidence established that the goods had been discharged upon the wharf, and that the respondents were employed in removing them to their stores at the time the seizure was made, and that it was further proved that the appellant was aware of this, and consequently knew that the respondents were in possession of the goods in question, and notwithstanding this, he seized the goods as of and belonging to Fortier, and in his hands and possession. The Court below rightly set aside the seizure as illegal, and the judgment appealed from is therefore confirmed.

CASALT and LANGLOIS, for appellants.

STUART and VANNOVOUS, for respondents.

## COUR SUPERIEURE.—QUEBEC.

Présent :—CHABOT, Juge.

No. 1165. { FRASER et ux,..... Demandeurs.  
vs.  
POULIN..... Défendeur.

Jugé :—1o. Qu'un enregistrement par sommaire d'une réclamation hypothécaire fondée sur un acte de donation, qui n'énonce pas le montant réclamé, est nul, par rapport à un acquéreur subséquent de bonne foi qui a dûment enregistré son titre d'acquisition.

2o. Que tel sommaire doit contenir les matières nécessaires pour faire apparaître tout les droits que l'on veut conserver au moyen d'icelui.

Held :—1o. That registration by memorial of an hypothecary claim founded upon a deed of donation, which does not state the amount of the claim, is inoperative as against a subsequent *bona fide* purchaser who has duly registered his deed of acquisition.

2o. That such memorial should contain the allegations necessary to disclose all the rights sought to be preserved by means thereof.

Jugement rendu le 19 décembre, 1857.

L'action était en déclaration d'hypothèque pour la somme de £50, en vertu d'un acte de donation consenti par les demandeurs en faveur de Thomas Fraser, leur fils, en date du 26 avril 1854, et était dirigée contre le défendeur comme possesseur des immeubles ainsi hypothéqués. Le défendeur plaïda, que par acte de vente en date du 19 juin 1856, consenti à lui, le défendeur, par Corriveau et sa femme, il avait acquis les immeubles en question, et que son titre susdit avait été enregistré au long le 21 juin 1856, au bureau d'enregistrement pour le comté dans les limites duquel étaient situés les dits immeubles. Que l'acte de donation sus mentionné n'avait été enregistré que par sommaire, le 2 août 1855, et que le sommaire ainsi enregistré ne contenait aucune mention de la somme de £50, pour laquelle l'action était instituée; et qu'en conséquence les demandeurs n'avaient aucune hypothèque pour la dite somme, et que leur action devait être renvoyée avec dépens. Par le certificat du registrateur filé en la cause, il affirme que l'enregistrement de l'acte de donation avait été fait par sommaire, et que ce sommaire ne faisait aucune mention de la somme de £50, réclamée par les demandeurs.

CHABOT, Juge.—La Cour est d'opinion que le plaider du défendeur qui dit, que l'enregistrement par sommaire devrait contenir toutes les allégations essentielles et nécessaires pour conserver les droits réservés, est bon. La somme ou montant de l'hypothèque est certainement essentiel, et devrait être mentionné dans le sommaire,—*Ordonnance d'enregistrement* clause 10. Les anciennes autorités aussi disent la même chose, MERLIN au mot *Bordereau*, où il est expressément dit, que le montant de l'hypothèque réservée, devrait être mentionné dans l'enregistrement. La seule question qui se présente ici est simplement, l'hypothèque réclamée en cette cause, a-t-elle été enregistrée? Il n'y a pas eu d'enregistrement tel que requis par le statut, et conséquemment il n'y a pas eu d'enregistrement suivant la loi. L'action est en conséquence renvoyée avec dépens.

PLAMONDON et DECHÊNE, pour les demandeurs.

TASCHEREAU et DUVAL, pour le défendeur.

### POLICE COURT.—QUEBEC.

Before :—J. MAGUIRE, Esqr. Inspector and Supt. of Police.

The " WINSKALES " INNES.—*Action of Elliot.*

Held :—That an agreement entered into by the master of a vessel with his crew, subsequent to the execution of the mariner's contract, to discharge and pay them their wages at a port other than and previous to the ships arrival at her final port of discharge, is not binding upon him.

Jugé :—Qu'une convention entre le capitaine d'un vaisseau et son équipage, fait postérieurement à l'exécution du contrat entr'eux, par laquelle convention ce premier s'engage à les renvoyer et à leur payer leurs gages dans un port autre que celui indiqué comme le port de décharge, est nulle.

Judgment rendered the 7th. July, 1858.

This was an action for the recovery of wages. The promoter shipped as seaman on a voyage from Sunderland to Portsmouth, in New Hampshire, U. S., thence to Quebec and back to a port of discharge in the United Kingdom, while the vessel lay at Portsmouth, the defendant (the mas-

ter) signed a document bearing date the 11th. June 1858, whereby he agreed to discharge the promoter on the arrival of the ship at Quebec, and pay him his wages. The British consular agent was a witness to the execution of this document, and it bore his signature as an approving party thereto. The suit was based on this document, and it was alleged that it had been entered into by the master in consideration that the promoter should desist from the further prosecution of a complaint then pending against him at the instance of the promoter.

The defence was, that the promoter and two other hands, while the ship lay at Portsmouth, on the 9th. June, left the vessel without leave, and refused to do duty on board, without legal excuse or cause : that the ship was then about to proceed to sea, the pilot being on board ; that the master was unable to obtain other seamen in lieu of the absentees, and the ship was in consequence detained for some days. That the master seeing his inability to proceed to sea without these men, and as no others could be procured, signed the document in question. That he did so solely in consequence of the position in which he was placed by the misconduct of the promoter and his companions, and with the object of inducing them to return to their duty. That no consideration had been given for the master's promise to discharge the complainant. That by law, apart from the premises, the undertaking of the master as set forth in the document, and the document itself, were null and void, and that, in consequence, the original agreement with the promoter to remain on board till the vessel returned to a port in the United Kingdom still subsisted.

The allegations of the plea were proved.

**WILLAN**, for promoter.—The complainant is entitled to his wages. He claims on the undertaking of the master to discharge him here, without this undertaking he would not have come to Quebec, and the defendant was powerless to

compel him to do so. The vessel is moreover unseaworthy.

POPE, THOS., for master. —Unseaworthiness of the vessel has been already decided to be no ground for the recovery of wages; (1) besides, the proper course is to compel a survey. The agreement entered into at Portsmouth is not binding on the master. No agreement can be operative against him apart from that entered into by the articles or original contract, even if the master had promised to pay extra wages to the promoter in consideration of extraordinary exertion on his part, such undertaking would have been void, (2) and why should misconduct give him an advantage which merit could not enforce? If the master had promised to divide the wages of the promoter among the rest of the crew, when he was unable to supply his place, such a promise would have been void for want of consideration; (3) were the claim of the promoter allowed, a premium would be held out for encouraging seamen to violate their agreement and coerce the master into more favorable terms. Besides the right to recover wages here is dependent on the existence of certain conditions specified in the "Merchant Shipping Act of 1854;" the agreement in question is not of this number.

*Per curiam.* The Court has no hesitation whatever in dismissing this suit. The plea is a perfect answer to it. No agreement subsequent to the execution of the articles or mariner's contract can be binding on the master.

WILLAN, for promoter.

POPE, THOS., for master.

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(1) 8, L. C. Rep., p. 99, *The Pilot*.

(2) *Harris vs. Mason*, Peake N. P. C. 72.

(3) *Still vs. Myrick*, 2 Camp., 317.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.  
CROWN SIDE.

Before :—CARON, Judge.

*Ex parte.*—GUGY,.....Applicant.

Held :—1o. That in an application for criminal information for libel, the Court is placed in the position of a Grand Jury, and must have the same amount of information laid before it, as will warrant a Grand Jury in returning a True Bill.

2o. That a Grand Jury would not be warranted in returning a True Bill for libel, unless the libel itself were laid before them.

3o. That an application for a criminal information for libel must be rejected, unless the libel itself be filed with the affidavits upon which the application is founded.

Jugé :—1o. Que sur une application pour une information criminelle pour libelle, la Cour remplit les fonctions de grand jurés, et doit avoir par devant elle des témoignages qui autoriseraient des grands jurés à rapporter un *true bill*.

2o. Qu'un Grand Jury ne serait pas justifiable à rapporter un *true bill*, sans avoir par devant lui le libelle.

3o. Qu'une application pour une information criminelle pour libelle sera rejetée, si le libelle n'est produit avec l'affidavit produit au soutien de telle application.

Judgment rendered the 27th. July, 1858.

The applicant in this case, being a barrister in and for Lower Canada, and residing in this District, moved for leave to fyle a criminal information against J. H. Willan for libel, charging the said Willan with having, in the month of March, 1858, at Quebec, composed, written, printed and published, and for having caused to be printed and published, a false, scandalous and malicious libel, of and concerning the applicant, in the form of a printed paper, commonly called a "Broad-leaf," unless cause shewn, upon any day the Court should direct. The motion was supported by two affidavits ;—one by the applicant, in which the libellous passages were set forth, and severally denied and sworn to be false, scandalous and malicious ; the other, was made by one W. A. Kirk, in which it was sworn, that deponent was well acquainted with Willan's hand writing, and that the address and superscription on some copies of the printed libel complained of, which deponent had seen, were written by Willan ; and that from certain allusions in the libel, affecting deponent, in connexion with the applicant, it could only have come from the



said Willan and another person (*not named*) closely connected with him ; and that from circumstances to the knowledge of deponent, he was convinced that whether with or without the aid of another person, the said Willan had composed and caused to be composed, printed and published, the libel complained of.

The applicant contended, that he was entitled to a rule for a criminal information, upon the grounds disclosed in the two affidavits filed with his motion, that in England applications of this nature were of frequent occurrence, and readily granted by the Courts when the affidavits disclosed a libel of a sufficiently scandalous and malicious nature, to justify the Courts in interfering ; that in the present case the libel complained of, as appeared by his affidavit filed, was of the most scandalous and injurious nature, and that he was therefore entitled to relief by way of criminal information ; that in this country, it was true, there was no officer entitled, " Master of the Crown," such as existed and through whom proceedings of this nature passed in England, but that the criminal law of England having been introduced into, and being in force in this country, the offices necessary for its due execution followed with it ; and therefore, although there was no office of that particular name in existence here, there were analogous offices, possessing, in contemplation of law, the same functions, and that it was therefore in the power of the court to declare which particular office in connexion with the administration of criminal law in this country, possessed and could legally exercise the powers and duties of the " Master of the Crown " as exercised in England. That an additional reason why he was entitled to the granting of the present application was, that from the circumstances of the accused, he, the applicant, would not be able to recover any thing, even though he had a judgment in his favor, by a civil action ; and that the present course was consequently the only one by which he could hope to obtain any relief in the pre-

mises, and protect himself in future from a repetition of a similar injury.

CARON, Justice.—The Court is of opinion that the application cannot be entertained, inasmuch as the applicant has omitted to file with the affidavits upon which the application is founded, the libel complained of. It will be found in all the authorities upon the subject, and in the form of affidavit given in Chitty's Crim. Law. vol. 4, it will be seen, that the libel complained of must be filed with, and is always annexed to the affidavit upon which the application for a criminal information is based, so that the Court may be in a position to judge of the merits of the whole production complained of. It may be, that when extracts are taken disjointedly and separately from a written document, that these extracts may convey quite a different idea, than a perusal of the whole document connectedly would warrant, and therefore the Court cannot in the present case, in the absence of the alleged libel, grant the application now made. In applications of this nature the Court is placed in the position of a grand jury, as by this mean, a reference to a grand jury is avoided, and therefore it is necessary that the Court should be placed in possession of all the information which it would be necessary to lay before a grand jury to warrant them in finding a true bill. Now no grand jury would be justified in finding a true Bill for libel, unless the libel complained of were laid before them; for these reasons therefore the present application must be rejected.

There are other points of interest raised by the present application, but as it must be rejected for the reasons above stated, I think it unnecessary to advert to them.

Application rejected.

The applicant made and supported the motion himself.

BANC DE LA REINE, }  
 EN APPEL. } DISTRICT DE QUEBEC.

Présents :—Sir L. H. LAFontaine, Bart. Juge-en-Chef,  
 AYLWIN, DUVAL et CARON, Juges.

BLAIS,..... *Appelant.*  
 et  
 SIMONEAU *et ux.*,..... *Intimés.*

Jugé :—Qu'il n'y a pas lieu à l'action négatoire, quoique l'héritage en faveur duquel une servitude de coupe de bois a été créée, ait été agrandi, s'il n'appert que la servitude soit, en conséquence, devenue plus onéreuse.

Held :—That the action *négatoire* will not lie notwithstanding that the realty in favor of which the service of a *coupe de bois* was created has been enlarged, if it be not made to appear such service has, in consequence, become more onerous.

Jugement rendu le 12 juin, 1858.

L'appel était interjeté d'un jugement prononcé par la Cour Supérieure à Québec le 20 novembre, 1857, renvoyant une action négatoire portée par l'appelant contre les intimés. Les faits qui donnèrent origine à l'action sont ceux-ci : Feu Joseph Marc Blais épousa Marie Marguerite Bélanger dans le cours du mois de janvier, 1818. Par leur contrat de mariage, passé pardevant maître Letourneau et confrère, notaires, il fut convenu qu'il y aurait communauté de biens entre eux, même dans leurs propres, qu'ils ameublirent, pour les faire entrer dans la communauté. Louis Blais et son épouse intervinrent au dit acte, et firent donation au dit Joseph Marc Blais, leur fils, de deux terres, situées dans la paroisse de St. Pierre, Rivière du Sud, ayant, l'une deux arpents et une perche de front, sur trente sept arpents de profondeur, avec toutes les bâtisses dessus construites, l'autre n'ayant que six perches de front sur la dite profondeur de trente sept arpents. Le dit Louis Blais et sa dite épouse donnèrent de plus par cet acte à leur dit fils, ce acceptant pour lui, ses hoirs et ayants cause, à l'avenir, le droit de prendre du bois de chauffage, charpente et autres quelconques pour son usage et le besoin des terres sus-données, sur les terres à bois d'eux dits donateurs, situées

en la dite paroisse de St. Pierre, Les deux terres ainsi données au dit Joseph Blais étaient séparées dans toute leur profondeur, par une lisière de terre appartenant alors à un nommé Campbell. Le 16 janvier, 1821, le dit Louis Blais et sa dite épouse donnèrent à l'appelant, aussi leur fils, une terre dans la dite paroisse, et de plus les deux terres à bois, sur lesquelles ils avaient créé en faveur du dit Joseph Marc Blais, la servitude de coupe de bois, " avec " la réserve du droit pour le dit Joseph Marc Blais, ses " hoirs et ayants cause sur ces terres, suivant, conformément, et aux charges portées et convenues en le dit contrat de mariage du dit Joseph Marc Blais." Le 22 février, 1822, le dit Joseph Marc Blais acquit la lisière de trois perches de terre, qui séparait les dites deux terres que ses père et mère lui avaient données par son dit contrat de mariage. Le dit Joseph Marc Blais mourût en 1827, et sa veuve épousa l'intimé le 14 janvier, 1833.

La déclaration de l'appelant, après avoir allégué les faits susmentionnés, alléguait ensuite que les intimés Augustin Simoneau et Marguerite Bélanger son épouse, comme représentant le dit Joseph Marc Blais, ne se contentaient pas de prendre du bois sur les deux terres tenues à cette servitude pour l'usage et le besoin des deux terres sus-mentionnées, mais en avaient pris et prenaient encore pour les besoins d'une autre terre, à l'entretien et aux besoins de laquelle les deux immeubles en question n'étaient pas tenus en vertu des actes ci-dessus cités ni d'aucun autre acte, savoir, " une terre de trois perches de front sur trente sept arpents et demi de profondeur, etc., etc., et que depuis plusieurs années, malgré les défenses de l'appelant, les intimés avaient continué de prendre du bois sur les deux terres en question pour clôturer et bâtir cette autre terre des intimés, et que de fait les intimés réclamaient sur les dites terres de l'appelant le droit d'une coupe de bois. Les conclusions de la déclaration demandaient que les deux terres de l'appelant seraient déclarées franches et exemptes de cette servitude.

Les intimés plaidèrent que, bien qu'ils eussent droit de prendre du bois sur les dites deux terres de l'appelant *pour leur usage*, et pour le besoin des terres données au dit feu Joseph Marc Blais, ils n'avaient jamais prétendu, ni ne prétendaient avoir droit de prendre du bois sur les dites terres de l'appelant, pour les dites trois perches de terre, et qu'ils n'en avaient jamais pris ; que l'acquisition des dites trois perches de terre, faite par le dit Joseph Marc Blais, loin d'augmenter la dite servitude de coupe de bois, l'avait au contraire diminuée, puisqu'en devenant propriétaire de cette lisière de terre, il avait cessé d'être obligé de faire sa part de clôtures de ligne di'celle, de chaque côté dans toute la profondeur de trente sept arpents, et que de fait les dites clôtures de ligne n'existaient plus ; qu'eux les intimés avaient bâti une maison, il est vrai, mais que le bois avec lequel elle avait été construite, avait été préparé dès avant la mort du dit feu Joseph Marc Blais, puisque ce bois avait été vendu, et acheté par sa veuve, lors de son inventaire ; et qu'au lieu de prendre sur les dites deux terres de l'appelant tout le bois dont ils avaient eu besoin pour leur usage, ils en avaient acheté de l'agent des terres de la couronne, et d'autres personnes, presque tous les ans, plus qu'il n'en aurait fallu pour le besoin de ces dites trois perches ; que la maison et la grange, que l'appelant alléguait avoir été dernièrement construites sur les dites trois perches, étaient les mêmes bâtiments existant depuis plus de vingt ans, et qui avaient été seulement déplacés.

La preuve produite dans la cause était contradictoire. De la part du demandeur il était prouvé ; Que les intimés avaient coupé sur les deux terres de l'appelant, pour l'usage de leur terre de trois perches, du bois de chauffage, des pieux, et du bois de construction ; qu'il y avait environ trois ans, les intimés, qui avaient une maison et une grange sur leurs autres terres, avaient défait cette maison et cette grange et les avaient rebâties sur les trois perches en question. Il n'avait fallu que peu de bois neuf pour rebâtir cette

maison, et il avait été pris sur les deux terres de l'appelant, et quant à la grange, il avait fallu presque tout du bois neuf pour la refaire, et ce bois avait été pris sur les deux terres de l'appelant ; qu'il y avait un autre individu qui occupait une partie des immeubles ayant droit à la coupe de bois réservé à Joseph Marc Blais, savoir son fils Gaspard Blais ; qu'il y avait deux maisons et deux granges, dont une maison et grange sur les autres terres des intimés, et une maison et grange sur la terre de trois perches en question ; que des pieux pris par les intimés sur les deux terres de l'appelant avaient été employés par les intimés sur les trois perches.

De la part des défendeurs il était établi que l'acquisition des dites trois perches de terre par le dit Joseph Marc Blais, au lieu de rendre la coupe de bois plus onéreuse à l'appelant, l'avait diminuée ; que les intimés achetaient du bois depuis longtemps pour la clôture de leurs terres, et pour les réparations de leurs maisons et granges, et même plus qu'il n'en aurait fallu pour *le besoin* des dites trois perches ; que, de plus, l'appelant avait à-peu-près ruiné les dites deux terres à bois ; qu'il avait vendu huit à neuf cents bilots d'épinette à un seul individu ; que pour dix chelings il avait vendu assez de bois à un habitant de l'endroit pour le chauffage de sa maison pendant deux ans, et ce dans le but de priver les intimés de leur dite coupe de bois.

TASCHEREAU, pour l'appelant, maintenait que le jugement de la Cour Inférieure était erroné, parceque les intimés prétendaient justifier leurs actes, en disant que la grange et la maison qui se trouvent depuis quatre à cinq ans sur les trois perches n'y avaient été bâties que comme remplaçant la maison et la grange qui existaient auparavant sur leurs autres terres ; mais l'appelant soumettait humblement qu'une servitude ne pouvait être étendue au delà des bornes prescrites par le titre, et que la prétention des intimés était sans nul fondement

Bossé, pour les intimés, alléguait que le jugement de la Cour Inférieure devrait être confirmé, parceque suivant les termes des deux actes de donation sus-mentionnés les intimés avaient droit de couper du bois sur les deux terres en question, non pas seulement pour le besoin des terres sus-données à feu Joseph Marc Blais, mais qu'ils avaient encore le droit d'en couper pour leur propre usage, et que c'était sur cette interprétation des dits actes que la Cour Inférieure avait fondé son jugement, et qu'en conséquence il devrait être confirmé.

Sir L. H. LAFONTAINE, Juge-en-Chef.—La Cour est d'opinion que le jugement de la Cour Inférieure est correct et doit être confirmé. Il y a preuve que la servitude n'a pas été rendue plus onéreuse depuis l'acquisition de la terre de trois perches dont il est question en cette cause.

Jugement confirmé.

TASCHEREAU et DUVAL, pour l'appelant.

BOSSÉ et CARON, pour les intimés.

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QUEEN'S BENCH, } DISTRICT OF QUEBEC.  
 APPEAL SIDE. }

Before:—SIR L. H. LAFONTAINE, Bart., Chief Justice,  
 AYLWIN, DUVAL and CARON, Justices.

HALL,..... Appellant.

and

DUBOIS *et al*..... Respondents.

Held:—That a party who contracts to pay a ground rent for ever à perpétuité deprives himself of the power of making a déguerpissement.

2o. That the stipulation, "de payer la rente à toujours et à perpétuité," is equivalent to the obligation, "de fournir et faire valoir."

Jugé:—Qu'il n'est pas loisible à un preneur à bail à rente foncière non rachetable, de se libérer du paiement de cette rente en déguerpissant l'immeuble.

2o. Que la stipulation de payer la rente à toujours et à perpétuité équivaut à l'obligation de fournir et faire valoir.

Judgment rendered the 12th. June, 1858.

The respondents instituted their action in the Court below, for the recovery of £57, being for one year's ground rent, in virtue of a deed bearing date at Quebec the 7th. March, 1854, by which they transferred to the appellant, à titre de bail à rente foncière, a certain piece of land, in consideration of an annual *rente foncière perpétuelle et non rachetable* of £57, payable annually on the 1st. September. The appellant pleaded, that before the entry of the action, he had tendered the respondents, under notarial protest, the sum of £89 10 11 to wit, the £57 0 0 demanded by the action for the year's rent due on the 1st. September, 1857, also £14 5 0 for the then current quarter's rent, and also £14 5 0 for another quarter in advance, together with £3 15 11 for the costs of the action before entry, at the same time offering to abandon (*déguerpir*) the lot of land in question to the respondents, in order to liberate himself from the obligation to pay any further or future rent; that the above tender was made subject to respondent's acceptance of the *déguerpissement* thereby offered and made; that the respondents refused the tender thus made; the plea reiterated the tender, and with the plea the appellant deposited the sum of money tendered



in Court, and filed an *acte de déguerpissement*. The appellant also filed an incidental cross demand by which he prayed the *acte de déguerpissement* might be declared good and valid, and the respondents bound to accept the same, together with the above tender, and that he the appellant should be liberated and discharged from all future payment of the rent.

The respondents by replication to the plea, and by peremptory exception to the cross demand, alleged that the appellant could not liberate himself from the payment of the annual rent, nor abandon (*déguerpir*) the land in question, because he had contracted *de clore à ses seuls frais et dépens, le terrain par lui pris à bail, et d'entretenir ensuite les dites clôtures en bon ordre, à ses seuls frais, à perpétuité et sans aucun recours ni indemnité contre les demandeurs (intimés), leurs héritiers et ayans cause, qui en furent déchargés par le dit acte. Que de plus l'appellant s'était obligé par le dit bail de payer aux dits demandeurs, leurs héritiers ou ayans cause, à perpétuité, en leur demeure, la dite rente de £57 courant, perpétuelle et non rachetable.*

The appellant filed demurrers to both these pleas, which demurrers were dismissed by the judgment of the Court below, and final judgment was rendered against the appellant, defendant in the court below, for the sum demanded and costs, and the incidental demand was dismissed. (1)

From these judgments the present appeal was instituted.

For the appellant it was contended, that the undertaking to pay an annual rent of this nature *à perpétuité*, did not imply a personal obligation on the part of the *preneur à rente*, totally apart and distinct from the possession of the property ceded, and did not constitute a bar to the right to abandon (*déguerpir*); that although there was a considerable difference of opinion among the most eminent autho-

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(1) 7. L. C. Rpts. 479, *Dubois vs. Hall* and *Hall vs. Dubois*.

rities upon this point, yet that the weight of authority, and the letter as well as the spirit of the 109th. article of the Custom of Paris were opposed to such an interpretation; that the clause of that article, “*Jaçoit que par lettres, eût promis payer la dite rente, et obligé tous ses biens; et s’entend telle promesse tant qu’il est propriétaire,*” evidently referred to an undertaking such as that in question in the present case; that had the promise contemplated by the article been to pay temporarily, or only while in possession, the explanatory promise, “*s’entend telle promesse tant qu’il est propriétaire,*” would have been unnecessary; that the present case did not fall within either of the exceptions mentioned in the article; that it was not pretended that the appellant undertook to make any improvement on the land in question, which he had neglected to perform; and that it was evident from the terms of the deed that it was not included in the second exception; that the obligation on the part of the appellant only existed so long as he remained in possession of the property; that whenever therefore he wanted to relieve himself from the future payment of the rent, he could do so by abandoning the land to the respondents; that if the respondents had been desirous of excluding the appellant from exercising the right of *déguerpissement*, they should have caused a clearly expressed clause to this effect to be inserted in the deed of transfer; that not having done so, they must abide by the consequences of their own omission.

On behalf of the respondents it was urged, that the appellant could not liberate himself from the payment of the rent whenever he thought proper by offering to abandon the land, that he had contracted to pay the rent *à perpétuité*, and to keep the land fenced and in good order, free of all expense to the respondents *à perpétuité*; and this was equivalent to the clause *de fournir et faire valoir*; and that the judgment of the inferior court was correct and in accordance with the spirit and terms of the law in this respect, and ought to be maintained.

**ROSS and BORLASE, for appellant.**

**SUPERIOR COURT.—QUEBEC.**

No. 364. { ROBERTSON,..... Plaintiff.  
              { vs.  
              { JONES,..... Defendant.

**Jugé :—**Que dans un contrat, contenant une espèce de remise, il n'est pas nécessaire que la considération soit exprimée ; et que par rapport à tel contrat les formalités de droit quant aux donations ne sont pas obligatoires à peine de nullité.

The action was in assumpsit for £400. Plea, that the plaintiff agreed with the defendant not to exact payment during the defendant's lifetime, and with which plea the following memorandum, in writing signed by the plaintiff, was filed :—

“ I, the undersigned, Samuel Robertson, do give Randall Jones his time to liquidate his debt to me, for four hundred pounds, but after his death, the said Samuel Robertson will not be any way liable, and will do as he pleases.”

(Signed) **SAMUEL ROBERTSON.**

To this plea the plaintiff demurred on the ground that no consideration was alleged for such promise and agreement ; that the plea merely shewed a *nudum pactum* as a defense to the action, a mere pollicitation, and no binding contract on the part of the plaintiff to grant the delay above mentioned. The plaintiff also filed a special answer to the plea alleging the same ground of objection ; and, upon this latter issue, judgment was pronounced.

MEREDITH, Justice :—On the part of the plaintiff in this cause it is contended, that inasmuch as no consideration has been alleged by the defendant for the agreement of the plaintiff not to press payment during the life time of the defendant, that therefore such agreement is not binding on the plaintiff : this pretension would, it seems, according to the law of England, hold good with respect to a simple contract such as that pleaded by the defendant.

Addison says, in effect, “ a promise by a creditor to accept less than the full amount of an ascertained debt, or to give time for the payment thereof,” is a *nudum pactum*, if no consideration be expressed. (1) But, according to the law of England, it would be otherwise if the agreements to give delay were under seal ; for the rule with respect to such agreements is “ that where the contract is by deed, the cause or consideration is not enquirable, nor is it to be weighed, but the party ought only to answer the deed, and if he confesses it to be his deed, he shall be bound.” (2) Our law does not make any such distinction between contracts under seal and those not under seal ; and without expressing any opinion as to the English doctrine of estoppel with respect to deeds under seal, or as to the rule of the same law as to deeds not under seal, I may observe that it would seem to me most unreasonable to allow a plaintiff in a case such as the present to come into Court, and ask the judges to aid him in violating a promise which, so far as we can see, was deliberately made.

(1) Addison on contracts, p. 19.

(2) do do p. 1.

The plaintiff in the present case must admit that he promised not to exact the debt in question during the life time of the defendant, and yet, now, without assigning any justification for the course he wishes to pursue, he asks the Court to give its sanction to the violation of the assurance thus given by him to the defendant, and here it may be observed that there is, as to the point under consideration, an important difference between a promise to pay, and a promise not to exact payment.

There may be a failure to observe a promise of the first kind without any bad faith; for instance where by an inevitable calamity a debtor is deprived of the means of paying his creditors; but, as a general rule, there cannot, without bad faith, be a violation of a promise of the second kind, that is to say, of a promise not to exact a debt.

It is also to be observed that although an obligation cannot exist without a "cause honnête et légitime," (I use the French word "cause" because the English word "consideration" does not convey exactly the same idea,) yet it does not follow that the "cause" or consideration of an obligation must be expressed *à peine de nullité*.

Toullier says: "Les opinions des auteurs français avaient été partagées sur cette question, que les tribunaux ne décidaient pas toujours de la même manière. Cependant, la jurisprudence paraissait se fixer à l'opinion de ceux qui pensent que le défaut de l'expression de la cause ne rend pas l'obligation nulle, et qu'on doit toujours sous-entendre une cause juste et suffisante lorsque le contraire n'est pas prouvé." There is also, it appears to me, much sound sense on the following remarks of M. Maynard made in a work written as far back as 1574. "La jurisprudence des arrêts n'a pas voulu adopter les subtilités du droit romain. Dès qu'une obligation est consentie par un majeur, on la déclare valable, quoique la cause de l'obligation ne paraisse pas; parcequ'en effet, on ne peut pas présumer qu'un majeur s'oblige sans rai-

“son ni prétexte au paiement d’une certaine somme ; et  
 “si la cause de l’obligation ne se trouve pas exprimée,  
 “c’est sans doute parceque les parties avaient des raisons  
 “particulières pour la taire.” (1) M. l’avocat général Lus-  
 sier observed before the Parlement de Paris, the 29th. July,  
 1706 : “Par notre usage tout homme qui a signé une pro-  
 “messe volontairement *sine metu et sine dolo* est lié natu-  
 “rellement et civilement, et est astreint par sa signature à  
 “remplir son obligation indépendamment du défaut d’ex-  
 “pression de la cause.” (2).

Several *arrêts* are collected by Merlin in support of this view, and also several, it must be admitted, which tend to support a contrary opinion, but, upon the whole, the opinion of Toullier seems to be justified ; that the weight of authority is in favor of the doctrine that the failure to express the consideration, “*cause*,” of an obligation does not annul it.

I may add that, were we to adept a contrary doctrine, we would have to extend it to authentic instruments, such as notarial deeds, and thus we would have to carry the rule in question to a much greater length than it is carried even by the law of England ; for, by that law, no consideration beyond the mere will of the executing party, is necessary to give validity to a deed *under seal*. I do not deem it necessary, however, to dwell any longer on this point, nor do I intend to enter into any discussion as to the nature of the consideration, *cause*, which, according to our law is necessary to support contracts in general, because, as to the particular contract before us, it being a *contrat de bienfaisance*, the rule is plain that the desire to exercise an act of liberality is, itself, a sufficient consideration.—Toullier says : “Dans les contrats de bienfaisance la cause de l’obligation  
 “est la volonté de faire du bien à la personne à qui je  
 “donne ou envers qui je m’oblige ; *stat pro ratione volun-*

(1) Merlin, Questions de droit. vbo. Cause des obligations, p. 245, § 1.

(2) Merlin, Questions de Droit, p. 245, § 1.

"*tas*," (1) and Marcadé (2) says: "Si cette obligation unique est prise gratuitement, sa cause est dans le désir d'une partie de rendre service à l'autre."

It may, however, be said that if the agreement in question be viewed in this light, it is, in effect, a donation, and not being clothed with the formalities required by law for the validity of donations it is null.

The answer to this objection is; that the instrument in question contains, in effect, a *remise*; for although it does not discharge the debt itself, it discharges the right to exact it during a certain time, and the formalities required with respect to donations are not required with respect to *remises*. Toullier says: "La remise a toujours été tellement favorisée que, quoiqu'elle soit une véritable donation lorsqu'elle est gratuite, on n'a jamais, pour sa validité, exigé aucune espèce de formalités; elle peut être faite par une simple lettre missive comme l'a jugé un arrêt du 8 février, 1629, rapporté par Bardet" and in a note, the author adds, "Cet arrêt jugea sur les conclusions de M. l'avocat général Bignon qu'une libération ou donation par lettre missive du créancier au débiteur d'une somme de 8000 francs, était valable quoiqu'elle n'eût été ni expressément acceptée, ni insinuée, et qu'elle ne fut point sujette à révocation pour survenance d'enfants." (1)

I recollect that the above authority was quoted and acted upon by the Court of Queen's Bench at Montreal, in the year 1846, in the case of Delisle vs. Delisle.

For these reasons I am of opinion that the defendant's peremptory exception must be maintained, and the action of the plaintiff *quant à présent* dismissed with costs.

KERR and LEMOINE, for plaintiffs.

HOLT and IRVINE, for defendant.

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(1) 6 Toullier, p. 171, note to no. 166.

(2) 4 Marcadé, p. 344, no. 400.

# BEFORE THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present :—JUDGE OF THE COURT OF ADMIRALTY, LORD JUSTICE KNIGHT BRUCE, THE CHANCELLOR OF THE DUCHY OF CORNWALL, SIR EDWARD RYAN AND SIR JOHN TAYLOR COLERIDGE.

McCARTHY,..... *Appellant.*

and

JUDAH,..... *Respondent.*

It was decided in the Court of Queen's Bench, appeal side, 10. that in an action for the recovery of a sum of money, promised to a certain person, by an instrument in writing, in the event of such person marrying another person named, the defense being the general issue, it was sufficient for the plaintiff, who was in possession of the instrument, to obtain judgment to prove that the signature was authentic. 20. That in the case submitted, the two witnesses examined on behalf of the plaintiff were neither allied or of kin to the parties so as to render them incompetent as such witnesses: This decision having been submitted by appeal to the Lord of the Judicial Committee of the Privy Council, it was there.

Held :—That in the circumstances of the case it was incumbent upon the party plaintiff to prove all the facts, alleged by such party, to enable her to obtain her demand, namely: the signing of the instrument the delivery of the same to the plaintiff either by the party signing it or with his consent, and the accomplishment of the condition precedent.

Il fut décidé dans la Cour du Banc de la Reine, en appel. 10. Que dans une action pour recouvrer une somme de deniers promise à une personne par un écrit sous sein privé, dans le cas où telle personne épouserait une personne indiquée, la défense étant une dénégation générale, il était suffisant pour la demanderesse, en possession de cette écrit, pour obtenir jugement, de prouver la signature au bas de tel document; 20. Que dans l'espèce, les deux témoins entendus de la part de la demanderesse n'étaient ni parents ni alliés des parties, de manière à être témoins incompetents. Cette décision ayant été soumise par appel aux Lords du Comité judiciaire du conseil privé de Sa Majesté, il y a été

Jugé :—Que dans les circonstances de la cause il incombait à la demanderesse de prouver tous les faits par elle allégués, pour soutenir sa demande, notamment la signature au bas de l'écrit, la livraison d'icelui par le signataire ou par quel autre de son consentement, et l'accomplissement de la condition qui devait précéder le paiement de la somme promise.

Judgment delivered the 2nd. July, 1858.

The appellant is the executrix of Moses Hart. The respondent is the widow and executrix of Alexander Thomas Hart, an illegitimate son of Moses, of whom the respondent was a niece.

The appeal is against a judgment of the Court of Queen's Bench for Lower Canada (on the appeal side), in an action brought by the respondent against the appellant, by which payment of a sum of 1,500/. currency, with interest and



costs, is ordered to be made by the appellant, in her representative character, to the respondent.

The facts appear to be these :—

In August, 1840, Alexander Thomas Hart had made proposals of marriage to the respondent, and his father, Moses Hart, was very anxious that his proposals should be accepted. Alexander appears to have been a favourite with his father, to have been a clerk in his mercantile office at Three Rivers.

In the middle of August, 1840, Alexander went to New-York (where the respondent, then Miriam Judah, resided), for the purpose, apparently, of urging his suit; and on this occasion Moses Hart wrote and sent by Alexander to his niece, the respondent, a letter in the following terms :—

“ Three Rivers, August 15, 1840.

“ Dear Mariamne,

“ Aleck will deliver you this letter, and if you marry him it will not only please me, but you may rely that I shall take care of you that you do not want, and shall assist you both; and if you have children, they shall share in my estate as my other grandchildren.

“ Wishing your mother and family health and happiness,

“ I am,

“ Your affectionate uncle,

M. HART.

Two days afterwards he sent to her by the post the following letter :—

“ Three Rivers, August 17, 1840.

“ Dr. Miriam,

“ I received your two letters. Aleck took the first one, and said he would answer it. If you marry him, it would

give me much pleasure, and I will always take care of you.

"Wishing your mother and family health and happiness,

"I am,

"Your affectionate uncle,

"M. HART."

Both these letters show the desire of the testator that the marriage should take place, and hold out an assurance to the lady, that both she and any children she might have should be the objects of the affection and care of the writer; but except as to placing the children on an equal footing with his other grandchildren by his Will, the writer says nothing specific as to the extent or mode in which he would exercise his bounty.

The marriage took place in the month of December, 1840, whether with any reference to these letters, or any other engagements on the part of the testator, does not appear.

Upon the marriage the new married couple left New York, where the ceremony took place, and the wife accompanied her husband to Canada, and they took up their residence at Three Rivers (and, as it rather appears, in the testator's house), where Alexander continued for some years to live on the most affectionate terms with his father, and to act as his confidential clerk in the management of his business.

Whether, before the execution of the deed to which we are about to refer, any, or if any what, provision was made by the testator for his son and his wife, in conformity with the letters which he had written, does not appear; but on the 29th. of January, 1847, there being then two children born of the marriage, the testator made a formal donation *inter vivos* of the seigneurie of CourVal, a property, as it

seems, comprising about six square leagues, to Alexander for life, with remainder to his children, in fee (to use the terms of English law), and, in default of children, as to one-half to the respondent, for her life, with remainder to the testator's other children.

This deed contained no provision for the benefit of the respondent as distinct from the benefits to her husband and children, except the limitation to which we have referred.

On the 1st. of April, 1847, the testator made his Will, and thereby ratified the gift made on the 29th. of January preceding, and as to one ninth of the residue of his estate gave it to Alexander and the appellant in moieties.

At some period (the date is not distinctly stated) a violent quarrel took place between the testator and Alexander, in consequence of which, as is alleged by the appellant in her examination, "the testator put Alexander out of his house, and kept him out until he died."

On the 27th. of July, 1847, the testator made a Codicil to his Will, and thereby revoked the bequest of the share of residue made to Alexander.

In the month of April, 1852, Alexander died, having appointed the respondent his executrix, and she was duly appointed by the proper Court guardian of her children.

On the 15th. of October, 1852, Moses Hart died.

In the autumn of 1853 it was alleged by the respondent, for the first time, as far as appears, that she was in possession of a promise, written and signed by the testator, Moses Hart, by which he engaged to pay her 1,500*l.* currency, if she would marry his son Alexander, and on the 10th. of February, 1854, she brought an action claiming that sum from the appellant as the representative of Moses.

The plaint describes the respondent as Miriam Judah,

the wife of Alexander Hart, and she sues as well in her proper and private name "comme commune en biens avec son dit feu mari," as in her character of usufructuary legatee under his Will, and as guardian of her infant children—three sons who are named.

This may be not wholly unimportant, as it seems to show that the husband and children were supposed to have some interest in the property the subject of the suit.

The plaintiff alleged that on the 14th. May, 1840 (a mistake in the date which was afterwards corrected), Moses Hart wrote and signed a paper "sous seing privé," containing this promise.

It may be material to read this passage of the plaintiff—

"Que le quatorzième jour de mai, mil huit cent quarante, le dit Moses Hart désirant marier son fils adoptif, le dit Alexander Thomas Hart, alors demeurant avec lui, fit un engagement ou promesse par écrit sous seing privé, en langue anglaise, qu'il signa de sa propre main et écriture sous le nom de "M. Hart," par lequel il promit et s'obligea de payer en aucun temps, à la demanderesse en cette cause, sous le nom et qualification de "Miss Miriam Judah," la somme de quinze cents livres courant, si elle, la dite demanderesse, épousait le dit Alexander Thomas Hart, et transmit alors à la dite demanderesse le dit engagement ou promesse fait et signé comme susdit, comme le tout paraît au dit engagement ou promesse sous seing privé que la dite demanderesse produit et dont copie est ci-annexée."

No account is given of the mode in which this paper came into the possession of the respondent, beyond what may be found in the words that the testator "transmit alors à la dite demanderesse le dit engagement."

The plaintiff then alleged that upon the faith of this engagement the respondent consented to marry, and did marry

Alexander, and that without such engagement she would not have married him. No notice is taken in the plaint of the letters already mentioned.

To this plaint a plea was put in by the appellant, denying that any such promise had ever been made by the testator, and insisting that the paper was a forgery, and denying generally the facts stated in the plaint and the liability of the appellant.

In support of her case, the respondent produced the paper on which she relied, and examined twelve respectable persons acquainted with the handwriting of the testator, who all declared their opinion that the body of the instrument and the signature were written by him.

The paper itself was in these words :—

“ On demand, I will pay at any time to Miss Miriam Judah, if she will marry my adopted son Alexander Thomas Hart, 1,500*l.* currency.

“ M. HART.”

“ Three Rivers, 14th, August, 1840.”

This was the whole of the evidence on which, in the first instance, the respondent relied.

The appellant examined five witnesses, all well acquainted with the handwriting of the testator, who stated, with more or less confidence, their belief that the paper was not in his handwriting.

After the evidence had been closed, an application was made by the respondent for liberty to examine additional witnesses, and liberty was given to her on the 2nd. November, 1854, to prove by witnesses that, towards the end of August, or in the month of September, 1840, or about that time, the testator had told them that he had sent to the respondent a writing containing a promise to pay her 1,500*l.* if she would marry his son.

Under this permission the respondent examined two witnesses of the name of Judah, to whose evidence we shall have to refer.

On the 6th. June, 1855, the cause came before the first Court, which rejected the evidence of the two Judahs, on the ground of relationship, and held upon the merits that it was not proved and established to the satisfaction of the Court, by evidence produced in the cause, that the paper-writing whereon the plaintiff's action was founded was of the proper handwriting of the late Moses Hart, but that, on the contrary, it appeared to the Court that the said paper-writing is forged and counterfeit, and the Court dismissed the action with costs.

From this judgment, both as to the rejection of the evidence and on the merits, one Judge dissented.

On the 1st. October, 1856, this judgment was reversed by the Queen's Bench on appeal, the majority of the Judges being of opinion that the evidence of the Judahs was admissible, and that the instrument in question was proved to have been written and signed by Moses Hart, and the Court pronounced a judgment in favor of the appellant for the sum demanded, with interest from the 10th. February, 1845, the date of the institution of the suit, and with costs.

From this judgment one Judge, Mr. Justice Aylwin, dissented.

The Courts below seem to have considered that the sole point on which the question depended was this—whether the alleged note was in the handwriting of the testator or was a forgery. But their Lordships do not concur in that view, and it is material, therefore, to inquire what facts it was incumbent on the respondent to prove in order to establish her claim under the circumstances in which it was brought forward.

It must be admitted that those circumstances were such as to throw very great suspicion upon it.

The document in question was alleged by the respondent to have formed the ground upon which she had consented to marry the testator's son, and without which she would not have married him.

Immediately on the marriage, therefore, she became entitled to demand and to receive this sum, the interest of which would have formed some provision for herself and her husband.

Yet no payment of principal or interest is alleged ever to have been made or asked for, nor does the note appear ever to have been alluded to in the life time of Moses Hart.

It is suggested that no demand was made for many years, because the testator, in truth, was maintaining his son and the respondent ; and that if they had insisted on the note, it might have diminished or prevented his bounty towards them, and might have occasioned a rupture between them and the testator.

But, at some time before the death of Alexander, and, as it seems probable, in 1847, such rupture did actually take place ; the testator turned his son out of his house, and never received him back into it.

Why was no claim brought forward at this time ? Again, in April, 1852, Alexander died, and the respondent became his representative. What reason could prevent the claim from being then asserted ? There was, indeed, this circumstance to prevent it—that Moses Hart was then alive ; that he knew perfectly well whether he had ever made such a note, and, if he had, whether it had been handed over to the respondent, and had formed the consideration for the marriage ; and, if so, whether it had been satisfied by the substitution for it of the donation of the seigneurie of Cour-Val.

In October, 1852, Moses Hart died, and it is not till the

latter end of 1853, thirteen years after the promise is supposed to have been made, that any thing is heard of it.

Again, this note is said to have been made on the 14th. of August.

On the 15th. the testator writes a letter to his niece strongly urging the marriage, and holding out inducements to it, yet not saying one word of that which the plaintiff alleges to have been the engagement which induced her to contract the marriage.

On the 17th. he writes again in substantially the same terms, and for the same purpose, and is equally silent about this note.

Again, how did this note come into the possession of the respondent? When, and by whom, and for what purpose, was it delivered to her? In whose custody was it up to the death of Alexander? This is a matter within her own knowledge; she has delayed her claim till the only two other persons likely to know anything about the matter, Moses Hart and Alexander, are dead, and she gives no explanation at all about this most important point.

It is said that the evidence of parties themselves, their relatives and domestics, is inadmissible by the French Law and that therefore, she could not prove any statement she might make. It is by no means clear that she could give no proof of the facts: but, at all events, she knows, and could have stated, and was bound to state, how it was that she got possession of this instrument, if it was genuine. If her story was true, it could not be inconsistent with the facts proved in the cause, and the Court would have been able to judge whether the circumstances were such as to render direct testimony impossible; or, at all events, to dispense with its necessity. But, instead of any positive statement of the actual circumstances, we have had several different theories suggested by her counsel at the bar, none



of which appear to us to account for, or remove, the difficulties of the respondent's case.

When the instrument itself is examined, it is of a most singular appearance. It has apparently formed part of some larger paper, from which it has been torn away; and it was suggested by the leading counsel for the respondent, in his very able argument, that it probably had formed part of a letter which the testator had originally written to his niece, and that he tore off this portion of it and gave it to his son to take with him to New-York, and make use of, if he found it necessary in the prosecution of his suit.

But this is a purely gratuitous assumption; and, if it were true, there is no evidence that the paper ever was made use of; and, still less, that the testator ever was informed that it was made use of.

Again, the testator had promised to make some provision for the husband, wife and children. Was this gift intended to be for the sole and separate use of the wife? If so, it should have been secured to her by some deed. If it was intended to be the subject of settlement on her and her husband and children, then the question arises, whether the seigneurie of CourVal was intended to be given in addition to the 1,500*l.*, or in lieu of it. If the 1,500*l.* was not the subject of settlement before the marriage, the husband would have been entitled to receive it, whether the rights of the parties were governed by the English or by the French law: "*jure mariti*," if the English law prevailed; as administrator of the "*biens en communauté*," if the French law prevailed. The husband, therefore, might have accepted the seigneurie of CourVal in lieu of the 1,500*l.* promised (if it was promised) by the note. Were the husband and children to have both the seigneurie and the 1,500*l.*? All these matters would have been cleared up, if the demand had been made in proper time, but there seem strong objections to permitting a plaintiff to suppress a claim for

thirteen years, and to take benefits which the person against whom it is made may have conferred, in the belief that no such claim existed; and, after his death, when all possibility of explanation by him is removed, to bring forward, for the first time, the demand.

All these considerations appear to throw upon the respondent the onus of giving proof which, in ordinary cases, it might not be incumbent on her to produce. In ordinary cases, the possession of the document, assuming it to be genuine, might be sufficient proof that it was given to her by the person who made the promise, and that it came by lawful means into her hands.

But here the improbability of the testator ever having given to her this document, or of its ever having come by lawful means into her hands for the purpose of being enforced, is so great that their Lordships think that much more is required from her, and that she has not discharged herself of the onus thrown upon her. If this paper was amongst the testator's papers, Alexander, before his quarrel with the testator, had ample opportunity of possessing himself of it. If it was given to Alexander by the testator for any purpose (explained possibly by that portion of the document which has been removed), it may have been in his possession at his death, and have thus come into the hands of his executrix, the respondent. In the absence of all evidence or explanation of any of these matters, there appears to their Lordships to be a strong presumption either that this instrument never constituted a valid claim against the testator, or that, if it did, the claim under it was satisfied in his lifetime.

These observations proceed on the assumption that the handwriting of the testator to the document is satisfactorily established. But their Lordships cannot say that this is by any means the case; no evidence is so unsatisfactory as testimony for or against the genuineness of handwriting.

Probably, if it were necessary to decide positively one way or the other on the fact of the handwriting, without reference to the surrounding circumstances, the evidence in favour of it might be considered to preponderate. But the respondent is the plaintiff, and has to prove her case affirmatively, and their Lordships are very clearly of opinion that mere evidence of handwriting in this case is quite insufficient to establish the validity of the respondent's claim against all the circumstances of probability to which they have adverted. They cannot but entertain the belief that the claim of the respondent is fraudulent, whether the instrument by which she attempts to support it be or be not in the handwriting of the testator.

They do not think it material to consider whether the evidence of the Judahs ought to have been received. If such testimony be received, it will not at all alter their opinion. The evidence of both of these gentlemen consists of a deposition as to conversations which took place about fourteen years before ; and supposing their depositions to be accurate, they would not remove the grounds on which their Lordships have come to the conclusion that the respondent has failed in the proof of her case.

They must advise Her Majesty to reverse the judgment complained of, and to vary the original judgment by leaving out the words, " but that on the contrary thereof it appears to this Court that the said paper writting is forged and counterfeit," a declaration not necessary to support the judgment and with that variation to affirm such judgment. We think that the appellant must have the costs of this appeal, but that there should be no costs of the appeal from the first Court to the Court of Appeals in Canada.

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En Canada, la cause en appel fut entendue par Sir L. H. LaFontaine, Bart, Juge-en-Chef, Aylwin, Duval et Caron, Juges. Les observations suivantes furent faites lors de la reddition du jugement.

Sir L. H. LaFontaine, Bart., Juge-en-Chef:— L'intimée est seule exécutrice du testament de M. Moyses Hart, et administratrice de ses biens, aux termes de ce même testament. C'est comme telle qu'elle est poursuivie par l'appelante qui réclame de la succession de M. Hart, une somme de £1,500, courant.

L'appelante, qui est veuve d'Alexander Thomas Hart, a dirigé son action, tant en son propre et privé nom comme ayant été commune en biens avec son mari, et comme étant sa légataire en usufruit et en possession de ce legs, que comme tutrice aux trois enfans mineurs qui sont nés de son mariage avec le dit A. T. Hart, et qui sont légataires en propriété de leur père.

L'appelante était la nièce du dit Moses Hart, étant la fille de l'une de ses sœurs. Elle était domiciliée dans l'état de New-York, lorsque dans la ville de ce nom, elle épousa le dit A. T. Hart, le 2 décembre, 1840. Ce dernier, fils naturel du dit Moses Hart, avait alors son domicile dans la ville des Trois-Rivières (Bas-Canada), où il revient avec sa femme immédiatement après leur mariage, et où tous deux ont continué de demeurer depuis jusqu'à la mort du mari.

Avant d'énoncer la cause de l'action, je crois qu'il est à propos de rapporter ce que le père peut avoir fait, en forme de libéralités, envers son fils et sa nièce depuis leur mariage.

Par acte du 29 janvier, 1847, (Craig, notaire), Moses Hart fait à son fils A. T. Hart donation entrevifs de la *jouissance*, sa vie durant, du fief Courval dont il donne en même temps la propriété à Moses Alexander et David Alexander, deux enfans nés du mariage dont il s'agit, ainsi qu'aux autres enfans qui pourraient naître du même mariage : ajoutant, dans le même acte, que les dits enfans pourront disposer de cette propriété du jour du décès de leur père, " en toute propriété comme bon leur semblera....."

et " dans le cas où le dit A. T. Hart," est-il dit, " décéderait sans enfant de son dit mariage avec la dite Marian Judah, alors et au dit cas, le dit donateur veut et entend que *moitié* d'icelle seigneurie retournera en *jouissance* à Marian Judah, son épouse, si elle le survit, et, après sa mort, retournera en propriété ainsi que l'autre moitié, en " *jouissance à . . . .*," c'est-à-dire, à six autres enfants naturels du dit donateur, nommés au susdit acte.

Puis, par un testament en date du 1<sup>er</sup> avril, 1847, (Guillet, notaire,) M. Moses Hart confirme la donation entrevue du 29 janvier précédant, et déclare que, *d'abondant*, il lègue au dit Alexander Thomas Hart la *jouissance* du fief ou seigneurie de Courval : " laquelle dite *jouissance* et les revenus d'icelle, le dit A. T. Hart ne pourra vendre, engager, hypothéquer ni aliéner en aucune manière quelconque, et ne pourra être saisi par les créanciers du dit A. T. Hart, ou autres ; et quant à la *propriété* de la dite seigneurie, le dit testateur la donne et lègue à Moses Alexander Hart et à David Alexander Hart, enfants du dit A. T. Hart, issus de son mariage avec Marian Judah, et à tous les autres enfants qui pourront à l'avenir naître du dit mariage, pour être partagée entre eux." Puis il donne au dit A. T. Hart " tous les arrérages de cens et rentes, lods et ventes, et autres droits seigneuriaux qui seront échus et dûs au décès du dit testateur dans le dit fief ou seigneurie de Courval, et le tout aux clauses et conditions portées au dit acte de donation, et avec les réserves y mentionnées."

Outre plusieurs legs particuliers faits à d'autres personnes, ce testament contient un legs universel qui est divisé en neuf parts, dont l'une " au dit Alexander Thomas Hart et à la dite Mary McCarthy (l'intimée) pour être " partagée également entre eux." Mais par un codicile du 27 juillet de la même année, (Guillet, notaire), le testateur exclut le dit Alexander Thomas Hart du susdit legs universel, et par conséquent le prive de la moitié qu'il devait

avoir dans un neuvième de ce legs ; laquelle moitié est expressément, par ce codicile, donnée à un autre fils du testateur.

Le père et le fils sont décédés en l'année 1852, savoir le dit A. T. Hart le 26 avril, et le dit Moses Hart le 15 octobre.

On voit qu'au temps de la donation entrevifs du 29 janvier, 1847, il y avait deux enfants vivants du mariage de l'appelante avec le dit A. T. Hart, qu'il y en avait trois à la mort du testateur, et que ce lui-ci avait survécu à son fils.

L'appelante n'ayant donc aucune part dans la seigneurie de Courval, il s'en suit que, si elle a pu participer aux libéralités de son oncle, le testateur, cela n'a pu être, pour ainsi dite, qu'accidentellement ou d'une manière bien éloignée, en sa qualité de commune en biens avec son mari, et encore seulement dans les fruits et revenus que la communauté a pu recueillir de la seigneurie de Courval.

Telle est la position que la donation entrevifs, le testament et le codicile de M. Moses Hart, avaient faite à l'appelante, pour racheter comme le prétend l'intimée, les promesses d'avantages ou de libéralités pécuniaires que le premier avait pu faire à sa nièce, pour l'engager à épouser son fils naturel.

Il faut avouer que si de telles promesses ont été sérieusement faites à l'appelante, elle n'a pas du trouver, dans cette manière de les accomplir, la réalisation des avantages qu'elle avait raison d'en attendre, du moins pour elle personnellement.

Ainsi frustrée dans de légitimes espérances d'un avenir meilleur ; lorsqu'elle et son mari, porteurs d'un titre de créance qui, pour être d'un caractère particulier, n'en était pas moins obligatoire, ont pu s'abstenir de le faire valoir

du vivant de celui de la libéralité duquel il pouvaient peut-être attendre plus, à raison même de cette abstention de lui en demander le paiement ; ainsi frustrée, dis-je, on ne doit pas s'étonner que l'appelante cherche aujourd'hui à faire valoir à son profit ce même titre de créance, s'il est sincère, et s'il est encore obligatoire pour les parties. En effet, dans les circonstances qui viennent d'être exposées, c'est de la valeur de ce titre seul que l'appelante peut espérer la réalisation des avantages pécuniaires que son oncle lui avait promis pour elle-même, lorsqu'il lui proposa, avec de pressantes sollicitations, comme on va le voir bientôt, d'épouser son fils Alexander Thomas Hart. C'est donc ce titre qui fait la base de l'action de l'appelante contre l'intimée, et dont la date est à peine de quatre mois antérieure à son mariage. Il est ainsi conçu :

“ On demand I will pay at any time to Miss Mariam  
 “ Judah, if she will marry my adopted son Alexander  
 “ Thomas Hart, one thousand five hundred pounds cur-  
 rency.”

“ M. HART.”

“ Three Rivers, 14th. August, 1840.”

L'intimée s'est contentée de plaider la *défense au fonds en fait*, c'est-à-dire une dénégation générale des faits articulés dans la demande, ajoutant en même temps expressément que M. Moses Hart n'avait jamais consenti ou signé le billet en question. C'est sur ce point que semble avoir roulé toute la contestation ; et d'après cette manière de défendre à l'action, l'intimée est censée admettre que cette action est bien fondée, si le billet ou la promesse dont il s'agit est sincère.

Il est à propos de transcrire ici deux autres documents qui sont intimement liés à cette affaire, et dont l'existence est admise par l'intimée elle-même.

" Three Rivers, 15th. August, 1840.

" Dear Mariamne,

" Alek will deliver you this letter, and if you marry him  
 " it will not only please me, but you may rely, that I shall  
 " take care of you, that you do not want and assist you  
 " both, and if you have children, they shall share in my  
 " estate, as may other grand children. Wishing your mo-  
 " ther and family health and happiness.

" I am,

" Your affec uncle,

" M. HART."

" Three Rivers, August 17th. 1840.

" Dr. Miriam,

" I received your two letters, Aleck took the first one and  
 " said he would answer it, if you marry him, it would give  
 " me much pleasure, and I will always take care of you.  
 " Wishing your mother and family health and happiness.

" I am,

" Your affec uncle,

" M. HART."

Le jugement dont est appel donne gain de cause à l'intimée. D'abord il rejette les dépositions de MM- Thomas S. Judah et Henry Judah, les déclarant alliés de l'appelante au degré prohibé par la loi ; puis il la déboute de son action sur le motif énoncé par la Cour que la preuve, loin d'établir la sincérité du document sur lequel repose cette action, a, au contraire, constaté que c'était un document *faux et contrefait*. Ce jugement a été rendu par la Cour Supérieure siégeant aux Trois-Rivières, à la majorité de deux contre un, M. le juge Day ayant différé d'opinion d'avec ses confrères.



Tout git donc dans l'appréciation de la preuve testimoniale, aidée, si elle peut l'être, par une comparaison de l'écriture des trois documents sustranscrits. Je partage l'avis de M. le juge Day, et je concours par conséquent dans l'appréciation qu'il a faite de cette preuve. D'abord le tribunal de première instance s'est trompé en déclarant les deux témoins Judah alliés de l'appelante. Ils ont eux-mêmes affirmé qu'entre elle et eux, il n'existait aucune parenté ou alliance. Le seul fait qui puisse expliquer l'erreur que je signale, est celui de l'alliance qui a existé entre ces deux témoins et le défunt Moses Hart qui était devenu leur oncle par un premier mariage avec la sœur de leur père. Mais cela ne pouvait pas avoir l'effet d'établir une parenté ou une alliance entre eux et l'enfant d'une sœur du dit Moses Hart, comme l'est l'appelante, née d'un père étranger aux deux MM. Judah, bien que portant le même nom. C'est donc à tort que leur témoignage a été rejeté sur ce motif; cette partie du jugement doit donc être infirmée. Mais dussent ces deux dépositions ne pas être remises dans la balance, la conclusion à laquelle je dois en venir n'en serait pas moins la même, le reste du témoignage recueilli dans la cause étant, à mon avis, de nature à justifier pleinement cette conclusion.

Quatorze témoins ont été examinés de la part de l'appelante; tous déclarent avoir bien connu l'écriture et la signature de M. Moses Hart, et attestent d'une manière positive la sincérité du document dont il s'agit.

“ Je connais très bien l'écriture et la signature du dit feu “ Moses Hart ” dit M. Louis G. Duval, avocat, “ parceque “ je l'ai vu écrire et signer très souvent. Tout ce qui est “ écrit en langue anglaise au dedans de l'exhibit de la de- “ manderesse No. 1 (le document en question)... est de “ l'écriture du dit feu Moses Hart, et la signature *M. Hart*, “ au bas de cette écriture au dedans du dit exhibit, est la — signature et de l'écriture du dit feu Moses Hart.” Et en répondant aux transquestions, il dit encore : “ Je n'hésite

“ pas à dire, d’après la connaissance personnelle et parfaite  
 “ que j’ai de l’écriture et de la signature du dit feu Moses  
 “ Hart, qu’au meilleur de mon jugement, tout ce qui est  
 “ écrit au dedans de l’exhibit de la demanderesse No 1,  
 “ comme je l’ai déjà dit, est de l’écriture du dit feu Moses  
 “ Hart, ainsi que la signature, *M. Hart*, qui est également  
 “ de son écriture, et le tout me paraît avoir été écrit dans  
 “ le même temps et à la même heure par lui.”

M. James Dickson qui atteste la sincérité du document de la même manière que le témoin précédent, ajoute, en répondant aux transquestions : “ Je ne vois rien dans le  
 “ corps du dit exhibit No. 1, dans la différence de l’écriture, pour faire croire que le dit écrit n’a pas été rédigé  
 “ par la même main et en même temps.”

M. Craig, qui déclare avoir été le notaire de Moses Hart depuis l’année 1827, s’exprime ainsi : “ le corps de l’exhi-  
 “ bit, c’est à dire l’écriture de l’exhibit No. 1, est tout de  
 “ l’écriture du dit feu Moses Hart et paraît avoir été écrit  
 “ tout dans le même temps. Je n’ai pas vu le dit Moses  
 “ Hart écrire le contenu du dit exhibit, ni je l’ai vu signer,  
 “ mais je suis positif que c’est de son écriture et sa signature.”

M. Jos. E. Turcotte, avocat, dit : “ Je suis positif que  
 “ l’écriture du dit exhibit est son écriture, et la signature  
 “ au bas d’icelui sa signature,” (c’est à dire du dit Moses Hart).

“ Je n’ai aucun doute,” dit M. Woodward, “ que tout  
 “ le contenu du dit exhibit et la signature au bas d’icelui,  
 “ sont de l’écriture du dit Moses Hart et la signature *M.*  
 “ *Hart*, sa signature.”

Tous les autres témoins, sans compter les deux MM. Judah, attestent la sincérité de l’écrit en question d’une manière aussi précise que l’a fait le premier témoin, M. Duval. Enfin les affirmations des deux MM. Judah qui

ont eu, pendant plusieurs années des relations intimes et professionnelles avec M. Moses Hart, ne permettent plus d'entretenir le moindre doute. Leurs dépositions sont de nature à me persuader que si elle n'eussent pas été rejetées par la Cour de première instance pour le motif exposé plus haut, le jugement de cette Cour eût été tout autre qu'il n'a été.

L'intimée, de son côté, a fait entendre cinq témoins, dans la vue d'établir la fausseté du document en question. Ces témoins sont MM. John McDougall, marchand, Jean E. Domoulin, ancien notaire, H. F. Hughes, écuier, F. Dasyuva, avocat, et N. A. Duberger, écuier, qui tous déclarent avoir connu l'écriture et la signature du dit Moses Hart. Ils révoquent en doute la sincérité du document, mais en se fondant principalement sur la comparaison, entre elles, des lettres du document même, jointe à l'écriture des deux autres documents sustranscrits. Les deux premiers et le quatrième de ces témoins sont, après cet examen d'écriture, portés à déclarer assez positivement que l'écriture et la signature du billet en question ne sont pas celles du dit Moses Hart. Mais il n'en est pas de même des deux autres ; leur témoignage fait voir qu'ils entretiennent des doutes. M. Hughes s'exprime ainsi : " I now examine the " plaintiff's exhibit No. 1, and say it is impossible for any " man to swear that the signature at the foot thereof, that is " *M. Hart*, is not the signature of the said Moses Hart ; " but, to the best of my knowledge and belief, I do not " believe that the body of the said exhibit is written by the " said Moses Hart, and am doubtful if the signature at the " bottom, *M. Hart*, is his also." Et M. Duberger dit : " je déclare que si je voyais cet exhibit seul, je serais porté " à croire et jurer qu'il est écrit et signé par le dit Moses " Hart."

Après avoir attentivement examiné tous les témoignages, j'en suis venu à la conclusion qu'en les pesant, non seulement d'après leur nombre, mais encore d'après leur propre

valeur, la preuve de l'intimée ne doit pas l'emporter sur celle de son adversaire. Cette dernière preuve est positive ; elle est, d'après sa nature, plus forte que celle qui ne repose que sur une comparaison d'écritures ; elle ne laisse, par conséquent, dans mon esprit, aucun doute sur la sincérité du document qui sert de base à l'action. Au reste, ce document ne portât-il que la signature du dit Moses Hart, tandis que le corps serait d'une écriture étrangère, il n'en serait pas moins valable et obligatoire.

Il est attesté par les MM. Judah et un autre témoin que M. Moses Hart désirait beaucoup que sa nièce, l'appelante, épousât son fils adoptif qui alors n'avait rien par lui-même. Il était donc bien naturel, dans ces circonstances, que cette nièce mit à son consentement la condition de la garantie d'une espèce de dot de la part d'un oncle riche, comme l'était M. Moses Hart, qui lui faisait de pressantes sollicitations d'épouser son fils. M. Moses Hart lui-même s'en est plusieurs fois expliqué dans ce sens avec les MM. Judah, auxquels il a fait part de son intention d'assurer des avantages pécuniaires à sa nièce, si elle se rendait à ses sollicitations. Cette intention, il la leur a communiquée non seulement avant, mais encore après en avoir écrit à l'appelante. Il a été même jusqu'à mentionner à l'un d'eux la somme précise qu'il avait ainsi promise à sa nièce ; c'est celle portée dans l'écrit en question, £1500.

La lettre du 15 août, 1840, nous apprend que le fils était sur le point de partir pour New-York, car son père dit à l'appelante ; " C'est Aleck qui vous remettra cette lettre." Il est aisé de concevoir quel était le but de ce voyage ; et d'après ce que la preuve nous fait connaître des intentions et des désirs de M. Moses Hart à l'égard de l'union qu'il projetait entre son fils et sa nièce, nous devons être convaincus qu'il souhaitait ardemment que ce voyage eût un plein succès ; or, pour assurer ce succès, la promesse que comporte le document dont il s'agit, devait paraître à Moses Hart, l'un des meilleurs moyens à employer dans les circonstances. Le fils était, sans aucun doute, chargé de

présenter lui-même cet intéressant document qui pouvait peut-être décider de son sort.

Ainsi tout, dans cette cause, concourt à nous faire admettre la sincérité de cette promesse, de cet engagement de donner à l'appelante, le mariage avenant, la somme de £1500, comme étant l'acte libre et réfléchi de M. Moses Hart.

De plus, la lettre du 17 août nous fait connaître qu'il existait entre l'oncle et la nièce, une correspondance sur cet important sujet. Ecrite le surlendemain de la première ci-dessus transcrite, cette seconde lettre s'explique par le fait que, dans ce court intervalle, l'oncle avait reçu deux lettres de sa nièce, réception qu'il s'empresse d'accuser, en réitérant sa promesse de lui assurer des avantages, si elle épouse son fils. Evidemment ces deux lettres de l'appelante devaient y avoir rapport.

L'intimée ne peut se rendre compte que les parties aient laissé écouler tant d'années sans exiger le paiement de la somme qui aurait été ainsi promise. Si cet écrit eût réellement existé, dit-elle, du vivant du père, le fils aurait dû le faire valoir avant sa mort. Ce n'est pas à nous à nous lancer dans le champ des suppositions pour tâcher de découvrir quels ont pu être les motifs du fils. Cette abstention de sa part pourrait assez naturellement s'expliquer, d'un côté, par l'espoir qu'il pouvait nourrir d'avoir une plus large part dans la succession opulente de son père, et, de l'autre, par la crainte qu'une demande trop hâtive de paiement n'eût l'effet de le mécontenter au point de le porter à frustrer cet espoir, quelque légitime qu'il pût être. La preuve que cet espoir n'était pas sans fondement, même après la donation entrevifs du 29 janvier, 1847, c'est qu'on voit le mari de l'appelante appelé par testament à partager la succession de son père avec plusieurs des autres enfants de ce dernier. Il est vrai que cette disposition testamentaire, ainsi faite à son profit, fut peu de temps après révoquée par un codicile. Il a pu en ignorer le fait jusqu'à sa

mort, et continuer d'entretenir l'espérance d'obtenir de son père de plus grands avantages, soit pour lui, soit pour sa famille. Je ne pense pas qu'on puisse raisonnablement voir dans cette abstention de demande de paiement du vivant du père, aucun motif de soupçonner de faux l'écrit du 14 août, 1840, pas plus qu'on ne saurait, comme le prétend l'intimée, trouver un semblable motif dans le simple fait que l'appelante n'a porté son action qu'environ quinze mois après la mort de M. Moses Hart.

AYLWIN, Justice (*dissentiens.*) The first question presented in this case is as to the admissibility of the testimony of Thomas S. Judah & Henry Judah, two of the witnesses examined on the behalf of the plaintiff in the Court below. That testimony was rejected at Three Rivers, on the ground, that the witnesses were related to the plaintiff. This is manifestly an error, as no relationship at all exists between the parties. The late Moses Hart, it is true, was the uncle of the plaintiff as well as of the witnesses, but he was their uncle, only in consequence of his intermarriage with their aunt, and no connection arose between them and any other of his blood, except his issue by her. But, though the reason assigned by the court below be insufficient, there are other reasons which, in my opinion, render the confirmation of their ruling necessary. The ordinance of 1667, which governs this matter, title 22, article 3, in positive terms says : *les parens et alliés des parties jusqu'aux enfans des cousins issus de germains inclusivement, ne peuvent être témoins en matière civile, pour déposer en leur faveur ou contre eux, mais seront leurs dépositions rejetées.* The Judge according to the practice in France was bound *ex officio* to see the statutory prohibition to testify carried out, and to reject the depositions if taken. Although the Messrs. Judah are not related to the plaintiff, yet being the nephews of Moses Hart, they are cousins germain of Areli Blake Hart and Louisa Howard Hart, his children, by their aunt, who are legatees under the 8th., 9th. and 10th. bequests contained in his will, and his sole heirs at

law. The action having been brought against the defendant Mary McCarthy not in her own right, but in her capacity of executrix of the said Moses Hart, and as administratrix of his property, under the law of Lower Canada, Areli Blake Hart & his sister are parties interested in the suit. They are virtually the parties to the suit, Mary McCarthy *ne fait que prêter son ministère*, in the words of Guyot's Répertoire, *Verbo Témoignage*, vol. 17, p. 66, colonne 2. Under these circumstances, the two witnesses are absolutely disqualified from testifying in the cause, their evidence was properly rejected, and cannot lawfully be looked at now.

The next question to be considered, is also a question of evidence, whether the signature of "M. Hart" at the foot of the paper writing declared upon, be genuine or a forgery. The Court at Three Rivers was of opinion, that the paper was forged, and under all the circumstances of the case I would not disturb that judgment. The appearance of the writing is suspicious, as sworn to by the defendant's witnesses, and though fewer in number than those of the plaintiff, they assign reasons for their opinions, and enter more or less into a critical examination of the paper. I do not wish to bind myself by a positive opinion of my own upon this head, altho' the impression on my mind is that the paper was originally written in pencil, by Moses Hart, as a simple *projet*, and that it has been done over in ink, at a subsequent time.

In my views of the case, however, there are circumstances which shew, that the paper even if genuine, is insufficient to confer a right of action on the widow of Alexander T. Hart. This person is called "my adopted son," in the writing declared upon, but the record shews that he was one of several natural sons of Moses Hart. The date of the writing is the 14th. August, 1840. On the next day, viz, the 15th. in a letter addressed to Miriam Judah, the appellant, Moses Hart says: "if you marry him

" it will not only please me, but you may rely, that I shall  
 " take care of you, that *you do not want and shall assist you*  
 " both, and if you have children, they shall share in my  
 " estate as my other grand children."

On the 17th. August, 1840, he again writes: " if you  
 " marry him it would give me much pleasure, and I will  
 " always take care of you." The declaration states that  
 delivery was made to the appellant of the *engagement ou*  
*promesse par écrit sous seing privé*, that Moses Hart " trans-  
 mit alors à la dite demanderesse le dit engagement." Of  
 the fact there is no proof unless it be furnished by the pro-  
 duction of the paper by the widow of Alexander Thomas  
 Hart, after the death of her husband, and of her father in  
 law and uncle Moses Hart, on the 10th. February, 1854, that  
 is, nearly 14 years, after the date of the *sous seing privé*.  
 The declaration alleges, " que le dit Alexander Thomas  
 " Hart était alors pauvre de même que la dite demande-  
 " resse qui cependant était et pouvait encore être soutenue  
 " par sa mère" and " qu'en conséquence du dit engage-  
 " ment ou promesse écrite à elle faite, la dite demanderesse  
 " a consenti à épouser le dit Alexander Thomas Hart."  
 It is singular that under such circumstances, the appellant,  
 having this paper in her possession, should not have  
 enforced payment of such a sum as fifteen hundred pounds,  
 at the instant of the marriage. Of the fulfilment of the pro-  
 mises contained in the two letters of the 15th. and 17th. of  
 August, there is good proof on the record. On the 29th.  
 January, 1847, Moses Hart executed a deed of gift *inter-*  
*vivos* in favor of Alexander Thomas Hart, *son fils naturel*,  
 " et voulant donner des marques et des preuves évi-  
 " dentes de l'amitié qu'il porte et conserve et des services  
 " à lui rendus," the usufructuary enjoyment is given to  
 him during his life of the fief or seigniorship of CourVal,  
 " contenant deux lieues ou environ de front sur trois lieues  
 " de profondeur et plus s'il y a." This *donation* is made  
 " au dit Alexander Thomas Hart, de la jouissance sus-  
 " donnée comme *pension alimentaire*, et quant à la pro-



“ priété aux enfans ci-devant mentionnés et à ceux à  
 “ naître de son dit mariage avec la dite Miriam Judah,” et  
 “ de laquelle propriété les dits enfans ci-devant dénommés  
 “ et ceux à naître de son dit mariage avec la dite Miriam  
 “ Judah, pourront disposer du jour du décès du dit  
 “ Alexander Thomas Hart leur père en toute propriété,  
 “ comme bon leur semblera.”

The object of the paper of the 14th. August, supposing it to be genuine would be to specify the extent of his proposed liberality which is left indefinite by the two letters. But according to the terms both of the writing and of the letters, if taken together, the intention of Moses Hart was to make a donation *en faveur de mariage* to the future bride. By the law of Lower Canada, marriage settlements may be made, granting to the wife all the powers of a *feme sole*, to receive monies, to alienate moveable property and to hold and manage real estate. In the absence of such settlement, the *régime de communauté* arises at common law, and the husband, as the *chef* or head of the *communauté*, is invested with the sole management. The intention of Moses Hart, as can be collected from the terms of the writing of the 14th. August, was to make a gift or donation or to settle upon her the sum of £1500. Marriage, not preceded by a settlement in notarial form, frustrated donor's intention. The marriage of Miriam Judah took place at New York, and no antenuptial settlement or marriage contract took place. The terms of the deed of gift of the 29th. January, 1847, are such as to repair the want of a settlement. The son has the enjoyment of the fief for life by way of *pension alimentaire*, not liable to claims of creditors. The fee simple is in the children, and provision is made for the widow, upon the death of Alexander Thomas Hart. The plea of the defendant in the Court below treats the writing upon which the action was brought, as a promissory note, this is an error. It is really a gift, or promise to make and execute a “ donation ” in future. The declaration states “ qu'en conséquence du dit engagement ou promesse écrite

“à elle faite comme susdit, la dite demanderesse a consenti à épouser le dit Alexander Thomas Hart...” “de sorte que la condition apposée par le dit Moses Hart au don de quinze cent livres courant, qu’il voulait faire à la dite demanderesse par la promesse écrite sus-mentionnée s’est trouvée accompli.” It goes further and alleges, “Que sans cet engagement ou promesse écrite comme susdit du dit Moses Hart, de lui payer la dite somme de quinze cens livres courant, la dite demanderesse ne se serait pas mariée avec le dit Alexander Thomas Hart.” This last averment is utterly irreconcilable with the fact, that the execution of the promise was never demanded during the life time of Moses Hart, and that the first demand upon his estate was made nearly ten years after the date of the paper. Under the law of Lower Canada, “l’acceptation est un des élémens dont se compose la donation. Elle tient à son essence, le donateur n’est point lié, jusqu’à ce qu’il ait la certitude que son bienfait est accepté. *Non potest liberalitas nolenti acquiri*, dit la loi 19 § 2 ff de donat. On lit encore dans d’autres lois, *invito beneficium non datur*. Il n’y a donc de donation que du jour de l’acceptation ; d’où il résulte qu’il n’y en aurait jamais, si l’acceptation n’était pas faite du vivant du donateur et par le donataire lui-même.” Grenier, Traité des Donations, No. 56, vol. 1, pp. 362-3, 4 Edition, Paris.

“Si l’acceptation n’est pas faite par le donataire dans l’acte de donation, elle pourra l’être par un acte postérieur et authentique, dont il restera mitute. Mais alors l’acte d’acceptation devra être notifié au donateur, parce que ce n’est que de cet instant qu’il sait qu’il est lié et qu’il ne peut plus révoquer la donation.” Grenier, No. 57, p. 376.

In applying these principles to the case of the plaintiff, I find that it fails in the essential particulars of “acceptation” and delivery. At what time, how and by whom was the paper writing, upon which the action is brought delivered to

her? How and when did she notify to Moses Hart her acceptance, so as irrevocably to bind him to specific performance and prevent "revocation" or countermand? The declaration inferentially treats the fact of the marriage, in accordance with the terms of the writing, together with the averment that she would not have married but for the promise contained in it, as equivalent to "acceptation" and "notification." It is not so in my opinion. The "donation entrevifs" of the 29th. January, 1847. was a formal instrument which called upon the plaintiff and her late husband to enforce the demand for £1500, for which the present action has been brought, no such demand was then made, and she and her children now hold the seignior of CourVal under that donation. "Du vivant même du donateur, pour que la donation soit acceptée efficacement, il faut que les choses soient encore entières et que la donation n'ait pas été révoquée d'une manière expresse ou tacite. L'aliénation ou une autre donation constituerait une révocation tacite etc. En aucun cas la notification de l'acte de révocation expresse ou tacite n'est nécessaire, etc. Note d. No. 56, p. 363-4, 1, Grenier, *des donations*."

I should presume revocation or countermand from the mere fact of the execution of the formal deed of gift. In the statement of the case in the Court below, there is looseness on both sides; the declaration and the *defense* are untechnical. But as under our system of law, *les actions sont de bonne foi*, and no precise form of words is required in pleading, (12 Victoria, cap. 38, sect. 87,) I take up the evidence on both sides as applicable to the demand, and the conclusion I arrive at, is that the demand is neither sustainable nor sustained. For these reasons, I would affirm the judgment of the Court below and dismiss the action of the appellant with costs in both Courts.

Le jugement rendu le 1 octobre, 1858, est comme suit: (1).

La Cour, etc. Considérant que dans le jugement dont est appel, il y a mal jugé, 1o. en ce qu'il rejette les dépo-

(1) Présents:—L'hon. sir L. H. Lafontaine, Bart., Aylwin, Duval et Caron, Juges.

sitions de T. S. Judah et H. Judah, Ecrs., sur le principe qu'ils étaient alliés à l'appelante au degré prohibé par la loi, tandis que, de fait, ils ne lui sont nullement alliés; 2o. en ce que le dit jugement déboute l'appelante de son action, alléguant, pour motif, qu'il n'avait pas été prouvé à la satisfaction de la Cour Supérieure que l'écrit, qui servait de base à l'action, est de l'écriture de feu Moses Hart, mais qu'au contraire il paraissait à la dite Cour que le dit écrit était faux et contrefait; considérant que ce motif n'est pas justifié par l'appréciation de la preuve; qu'au contraire il résulte de cette preuve que le dit écrit est sincère, et qu'il a vraiment été écrit et signé par le dit Moses Hart:—Infirme le dit jugement avec dépens contre l'intimée; et cette Cour procédant à rendre le jugement que la dite Cour Supérieure aurait du rendre condamne la défenderesse ès dites qualités à payer à la dite demanderesse la somme de £1500 avec intérêt et dépens (L'hon. M. le juge Aylwin *dissentiente*).

Ce jugement a été infirmé au conseil privé.

BANC DE LA REINE, } DISTRICT DE QUÉBEC.  
EN APPEL.

Présents:— Sir L. H. LaFontaine, Bart. Juge-en-Chef,  
AYLWIN, DUVAL et CARON, Juges.

GARON, ..... *Appelant.*  
et

CASGRAIN, ..... *Intimé.*

Jugé:—1o Que l'abolition du retrait conventionnel par l'acte de la 18me. Victoria chap. 103, sec. 4, n'a point d'effet rétro-actif, et que le retrait peut s'exercer sur des immeubles aliénés avant la passation de cet acte.

2o Que l'avertissement du shérif, portant que des immeubles seront vendus à la charge des cens et rentes et autres droits seigneuriaux et conventionnels stipulés aux titres originaux de concession, est suffisant pour conserver le droit de retrait, sans qu'il soit besoin d'opposition afin de charge. (1)

Held:—1o That the abolition of the *retrait conventionnel* by the 18th Vict. cap. 103, sec. 4, has no retroactive effect, and that the *retrait* may be exercised upon immovables sold before the passing of the said act.

2o That the avertissement of the sheriff, stating that the immovables will be sold subject to the *cens et rentes* and other seigniorial and conventional charges and dues according to the original titles of concession, is sufficient to preserve the *droit de retrait* and that in such a case an opposition *afin de charge* was not required.

Jugement rendu le 12 octobre, 1857.

L'action portée à la Cour de Kamouraska par Casgrain contre Garon, avait pour objet de revendiquer, en vertu du

(1) Sir L. H. LaFontaine, *dissentiente*.

droit de retrait conventionnel, divers immeubles vendus par décret, et dont Garon s'était porté adjudicataire sous les circonstances qui suivent.

Le 13 mai, 1851, les biens de Pierre Garon, père de l'appelant, furent vendus par le shérif du district de Québec, dans une poursuite dans laquelle A. Langevin, prêtre, était demandeur contre le dit Pierre Garon et contre Pierre Thomas Casgrain, l'intimé actuel, tous deux défendeurs.

Henri Garon, l'appelant actuel, fils du dit Pierre Garon, se rendit adjudicataire de ces biens divisés en treize lots irréguliers.

Casgrain, l'intimé, seigneur du fief de la Rivière-Ouelle, voulant retirer ces biens, porta une action contre l'appelant, et obtint jugement lui octroyant le retrait.

L'appel était de ce jugement.

La cause présentait une question de fait, savoir : que Casgrain avait renoncé à son droit de retrait, moyennant certaines considérations. La Cour de première instance et la Cour d'appel ayant jugé cette prétention non fondée en fait, il est inutile de s'en occuper.

En point de droit l'appelant prétendait que le jugement de la Cour de première instance était incorrect pour les raisons suivantes.

1o. Parceque les immeubles vendus étant parties indivises d'immeubles dont l'appelant possédait une portion, il n'y avait pas lieu au retrait en pareil cas, et la vente n'équivalait qu'à un partage, par lequel l'un des copartageants ou copropriétaires réunit le tout.

2o. Parceque l'appelant étant le fils du défendeur originaire pouvait exercer le retrait lignager et être préféré au seigneur.

3o. Parceque les dits immeubles n'ayant pas été vendus

à la charge du retrait, ce droit qui n'est que conventionnel, si l'intimé l'a jamais eu, était perdu pour lui.

40. Parcequ'à l'époque où le dit jugement en retrait a été prononcé, le droit de retrait était absolument aboli par un acte de la législature qui dans ce cas n'a pas réservé le droit dans les actions pendantes, comme elle l'a fait par l'acte abolissant le retrait lignager.

50. Parceque par l'acte de la législature abolissant le retrait seigneurial, il est déclaré dans quel cas le seigneur peut exercer ce droit, savoir, seulement en cas de fraude de ses droits, ce qui n'est pas en question dans la présente instance. (1)

A ces prétentions de l'appelant l'intimé répondait :

10. Qu'il n'y avait point de preuve que l'appelant était propriétaire d'une partie indivise des immeubles vendus en justice.

20. Que les immeubles acquis par l'appelant n'étant point propres dans la personne de Pierre Garon, n'étaient pas sujets au retrait lignager ; (2) que le retrait lignager prime, il est vrai, le retrait seigneurial, mais que le retrait conventionnel l'emporte sur le retrait lignager. (3)

30. Que l'avertissement du shérif, portant que les immeubles saisis seront vendus à la charge des cens et rentes et autres droits seigneuriaux et conventionnels stipulés aux titres originaires de concession, a conservé le retrait et que dans ce cas il n'était pas besoin d'opposition afin de charge. (4)

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(1) Autorités citées par l'appelant en cette cause.  
Pothier, Traité du retrait, No. 112.—Pothier, vol. 1, pages 905, 990, 995 et suivantes.—Pothier, vol. 1, pages 285, 288, 696, 863, 897, 898.—Prudhomme, Traité des droits en roture, pages 473, 474 et suivantes, et pages 486, 478, 490 et 501.—18e. Vic. c. 103, sec. 4.—18e. Vic. c. 102—30 mai, 55.

Autorités citées par l'intimé.

(2) Coutume de Paris, Art. 129.

(3) Pothier, vol. 2, Traité des Retraits, no. 578.

(4) 11me. Wm. IV, chap. 15, s. 25.

40. Que l'acte de la 18e. Vict. chap. 103, s. 4, n'avait point d'effet rétroactif, et que le retrait pouvait s'exercer sur des immeubles aliénés avant la passation de cet acte.

50. Que le retrait conventionnel ne peut pas s'exercer seulement dans les cas de fraude.

Sur ces diverses questions la Cour à l'unanimité est d'avis :

10. Qu'il n'y a point de preuve que l'appelant fut propriétaire par indivis des immeubles saisis, au quel cas l'appelant eut du réussir.

20. Qu'il n'y a pas de preuve que les immeubles saisis fussent sujets au retrait lignager.

30. Sur le troisième point la majorité de la Cour est d'avis que le retrait n'a pas été purgé par le décret.

Sir L. H. LaFontaine, Bart., est d'avis que le retrait conventionnel n'ayant pas été nommément mentionné dans les annonces du shérif, a été purgé par le décret, et sur ce point il aurait infirmé le jugement de la Cour de première instance.

40. et 50. Sur les deux dernières questions, la Cour est unanime à déclarer que l'acte de la 18me. Vict. chap. 103, n'a pas d'effet rétroactif, et que le retrait n'est pas limité aux cas de fraude.

Le jugement de la Cour de première instance est confirmé : Sir L. H. LaFontaine, *dissentiente*.

TESSIER, pour l'appelant.

TASCHEREAU et DUVAL, pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.  
APPEAL SIDE.

Before :— SIR L. H. LAFONTAINE, Bart., Chief Justice,  
AYLWIN, DUVAL and CARON, Justices.

THE MONTREAL ASSURANCE COMPANY,..... *Appellants.*  
and

MCGILLIVRAY,..... *Respondent.*

Held:—1o. That a contract of Insurance against fire may be made and proved without writing.

2o. That a transfer, although notarial, of a mortgage the subject of Insurance, does not destroy the insurable interest then existing, a *contre-lettre sous seing privé* from the transferee shewing that the transfer was nominal.

3o. That a clause in the acts constituting the charter of an incorporated Insurance Company, providing "that all policies of insurance whatever, made under the authority of this act (1) or of the ordinance aforesaid, which shall be subscribed by any three directors of the said corporation, and countersigned by the secretary and manager, and shall be under the seal of the Corporation, shall be binding upon the corporation, though not subscribed in the presence of a board of trustees, provided such policies be made and subscribed in conformity to a by-law of the Corporation," does not exclude other means of proving a contract of insurance consented to by them.

4o. That interest on the amount insured may be awarded from the day of the loss.

Jugé:—1o. Qu'un contrat d'assurance contre le feu peut être fait et prouvé sans écrit à cet effet.

2o. Qu'un transport, même notarié, d'une hypothèque en raison de laquelle on a effectué une assurance, ne détruit pas l'assurance existant alors, une contre-lettre du cessionnaire, sous seing privé, constatant que le transport n'était que nominal.

3o. Qu'une clause dans les actes incorporant une compagnie d'assurance qui statue "que toutes les polices d'assurance que ce soit, faites en vertu du présent acte ou de l'ordonnance susdite, qui seront signées par trois directeurs de la dite corporation, et contresignées par le secrétaire et les régisseurs, et revêtues du sceau de la dite corporation, obligeront la dite corporation, quoique non signées en présence du conseil des syndics, pourvu que ces polices soient faites et signées conformément aux règles et règlements de la corporation," n'empêche pas la preuve par d'autres moyens d'un contrat d'assurance consenti par telle compagnie.

4o. Que l'intérêt sur le montant de l'assurance peut être accordé à compter du jour de la perte.

Judgment rendered the 7th. July, 1858.

On the 18th. February, 1852, Mrs. Reid was proprietor of a mortgage for £3000 upon the Hays House, granted by M. J. Hays, thereto previously the proprietor, but which he



had sold to M. V. Hays, by deed before Gibb, and his colleague, notaries, dated 2nd. January, 1852, the latter assuming the mortgage and undertaking to pay it in five years, and to have the building insured for Mrs. Reid's benefit to the extent of the mortgage.

Mrs. Reid was a party to this deed, accepting the conditions in her favour; on the 18th. February M. J. Hays, called on Mr. Murray, the manager of the Montreal Assurance Company, to effect an insurance on behalf of Mrs. Reid, he gave his own note payable to Mr. Murray's order, for the annual premium payable in ten days, which was afterwards endorsed by Murray, and placed in the Bank of Montreal for collection in the name and for the account of the respondents. The note was dishonoured at maturity, and notice of dishonor given Mr. Hays, he being at the time in insolvent circumstances.

By two transfers before Griffin, and colleague, notaries, dated 23rd. June, 1852, Mrs. Reid transferred, without warranty, £3000, part of her mortgage, to H. Taylor as curator to a substitution under the will of one McKenzie, and the remainder to McCulloch, Ermatinger and Taylor, accepting by the latter, as executors of the will of F. C. Cameron. These transfers were not notified to the appellant, but the respondent produced a *sous seing privé* document, in the nature of a *contre-lettre*, signed by Taylor, dated 24th. June, 1852, declaring the transfers to be nominal and without consideration; the Hays House was burnt on the 8th. July, 1852, and the respondent brought her action for £3000, the amount of the insurance which she alleged was effected on her behalf by M. J. Hays.

To prove the contract, the respondent produced at the trial Mr. Murray, manager of the company, M. J. Hays, H. Taylor and P. McGill, the former of whom produced a book of the Company containing the following entry.

Policy No, and for what period.	Name, Re- sidence, and Profes- sion of per- son Insured	Description & Si- tuation of Proper- ty Insured.	Of what materials the Build- ings are constructed	Sums In- sured in.	Rate of pre- mium.	Total amount of pre- mium received
				£ s. d.	£ s. d.	£ s. d.
8951 One year from 18th February 1862, dat- ed same day.	Dame El- izabeth Mc Gillivray, widow of the late Hon. James Reid, sole universal legatee un- der the last will & tes- tament of the said la- te Hon. Ja- mes Reid.	On a block of buildings, built of stone and covered with tin, occupied as a hotel, and known as the "Hays House," situate and form- ing the corner of Notre Dame Street and Dalhousie Square, Montreal; bounded on Notre Dame Street by a stone building co- vered with tin, owned by the Hon. D. B. Viger, on Dalhousie Square by a similar build- ing owned by Judge Mondesit, and in rear by Champ de Mars Street.	Stone, co- vered with tin.	3000 0 0	0 15 0	Null. 22 10 0

Murray's evidence was to the effect that Hays and applied for insurance and given his note for a yearly premium, Murray promising that a policy should issue if the note were paid, the insurance to be good until the maturity of the note. Hays denied that there was any condition attached to the acceptance of the note, and Taylor and McGill swore to Murray's having admitted that the insurance was effected.

The appellants objected to this evidence.

1st. Because verbal testimony could not be received to prove the contract as alleged.

2nd. Because verbal testimony could not be received to prove a contract of insurance, especially in this case, where the charter and by-laws of the company prescribed a particular mode of contracting.

3rd. Because Hays and Taylor were both interested witnesses.

4th. Because Murray was not competent to bind the company by a verbal contract and that he had exceeded his powers.

5th. Because his declarations or admissions of the alleged contract were not part of the *res gestæ*. These objections were overruled on the trial before a jury.

Other testimony was adduced with regard to the practice of the office, and as to the practice of insuring without policies.

The precise nature of the pleadings and the points raised by the parties appear in the charge of the honorable Judge who presided at the trial, signed by him and of record in the cause, and in the opinions of the judges of the Court of Queen's Bench forwarded with the record on an appeal by the Insurance Company to Her Majesty in Her Privy Council.

The jury gave a verdict for £3000, with interest from the 8th. July, 1852, date of the fire.

When the plaintiff moved in the Court below for judgment upon the verdict, the defendants merely protested that the case should be determined in their favor, and that as it would, in any case, *go to* appeal, they intimated their intention of raising the different questions that presented themselves in appeal, allowing the judgment to pass against them without argument.

AYLWIN, Justice, dissenting.—This Assurance Company is a body corporate, under an ordinance of the governor and special council, for the affairs of the province of Lower Canada, 4 Vic., cap. 37. The Stockholders at a general meeting are empowered to make "by-laws, ordinances, and regulations," for the management of the said corporation, and to "elect and choose such directors and other

“ officers, and vest in them such powers as to such majority  
 “ shall seem meet and right for the purposes aforesaid.”

“ The said corporation shall and may do and execute by  
 “ the *manner aforesaid*, all and singular other the matters  
 “ and things touching the business of the said corporation,  
 “ and subject, nevertheless, to the rules, regulations, stipu-  
 “ lations and provisions herein prescribed and established.”  
 The provincial statute of the 6 Vic., cap. 22, which con-  
 firms the ordinance, and vests new power in the corpo-  
 ration, provides in section 4, as follows, “ that all policies  
 “ of Assurance whatever, made under the authority of this  
 “ Act, or of the ordinance aforesaid, which shall be subs-  
 “ cribed by any *three directors of the said corporation*, and  
 “ *countersigned by the secretary and manager*, and shall be  
 “ *under the seal of the corporation*, shall be binding upon  
 “ the corporation, though not *subscribed in the presence* of a  
 “ board of Trustees, provided such policies be made and  
 “ subscribed in conformity to a by-law of the corporation.”—  
 Sect. 4.

By a by-law made on the 30th October, 1840, at a ge-  
 neral meeting of stockholders, “ the directors shall have  
 “ authority, together with the manager and secretary, to  
 “ make and effect contracts of insurance in the name and on  
 “ behalf of the corporation with any person or persons, &c.  
 “ against loss and damage by fire, on any house, stores,  
 “ &c., and all policies of Insurance so made *shall be signed*  
 “ *by three directors*, and *countersigned* by the manager and  
 “ secretary, and *under the seal of the corporation*, and shall  
 “ be binding and obligatory on the whole corporation, in  
 “ the same manner and with like force, as under the hand  
 “ and seal of each individual member of the corporation.”

“ The *directors before granting insurance* must be satis-  
 “ fied with the character of the applicant, and in no case  
 “ shall they exceed on any one risk, the amounts set oppo-  
 “ site the respective classes, as follows, &c.”

The forms of policy and *ad interim* receipt used by the company are on the record, and the conditions are printed as usual on the back of the policy. No. 7 of these conditions is to this effect. "No order for insurance will be of any force, unless the *premium is first paid* to the office, and all persons desirous to continue their insurance, must make their future payments, *on or before* the day limited by *their respective policies*, or the same will be void." The respondent claims from the company indemnity for a loss by fire, and seeks to enforce a remedy for the supposed breach of what is called in the declaration, "a verbal covenant and agreement" with them to insure. She alleges, that one Moses Judah Hays, her debtor under a notarial obligation, "*verbally*" covenanted and agreed, in consideration of a further delay to be granted to him for the payment of the debt and interest due to her, to insure, or cause to be insured, at his own proper expense, a certain building and premises in the city of Montreal, upon which the respondent had a special *hypothèque*.

The declaration asserts, that on the 18th day of February, 1852, the company "did agree to and with the said Moses Judah Hays, acting as aforesaid, that they would forthwith, to wit, *within two hours* from the making of the agreement lastly herein before mentioned, cause a policy of insurance to be made out and executed in due form, *embodying the conditions and stipulations* herein before recited, and to transmit the same to the plaintiff without delay." The conditions referred to here, are, that the company should not be liable "to make good any loss by fire which should happen by any foreign invasion, insurrection, riot, &c., or any military or usurped power, or by any earthquake or hurricane."

The declaration proceeds to state, that "she, the said plaintiff, and by *her said agent*, did repair to the office of the said defendants, and did request and demand of them the policy of insurance upon the said building and

“premises, covering the said sum of three thousand pounds,  
 “in the name of and for the benefit of her, the said plaintiff,  
 “as mortgagee (that is *créancière hypothécaire*) effected and  
 “ordered as aforesaid, by the said Moses Judah Hays.”

“That thereupon the said defendants, acting by one  
 “William Murray, the *manager* and *agent* of the said  
 “Montreal Assurance Company, *did* acknowledge and de-  
 “clare to the said plaintiff and her agent, that the said  
 “Moses Judah Hays had duly procured and effected an  
 “insurance upon the said building and premises, in the  
 “name and for the benefit and behoof of the said plaintiff  
 “as a mortgagee, at the office of the said defendants, for  
 “the sum of three thousand pounds, from said 18th Feb-  
 “ruary, 1852, to the 18th February, 1853, and did then  
 “and there again *promise to make out and execute* a policy  
 “of such insurance, for and in the name of the said plain-  
 “tiff as mortgagee, as aforesaid, and deliver the said policy  
 “to the said plaintiff, *or to her agent*, the following day, to  
 “wit, the 19th February, 1852, and did request of the said  
 “plaintiff *in the meantime to consider*, and did declare, that  
 “the interests of her, the said plaintiff, *were fully insured*,  
 “and her mortgage (that is *hypothèque*) to the extent of  
 “three thousand pounds, covered by the insurance as  
 “effected by the said Moses Judah Hays for the said,  
 “plaintiff.”

The declaration then avers, “that it was then, and for  
 “many years before had been, and still is, *the custom and*  
 “*ordinary course of dealing of the defendants, not to issue*  
 “*any scrip or policy for insurances effected by them, for many*  
 “*weeks and even months after the time of effecting such insu-*  
 “*rances. By means whereof* the said buildings and pre-  
 “*misses became and were duly insured by the said defendants*  
 “in favor and in the name of the said plaintiff, to the  
 “extent of three thousand pounds, and the defendants  
 “became and were bound and liable to deliver to the said

“ plaintiff a good and valid and effectual policy of insurance  
 “ for the sum of three thousand pounds for one year.”

“ That by reason of the premises, as aforesaid, the said  
 “ plaintiff, *confiding and relying on the good faith and inte-*  
 “ *grity, and the ordinary course of dealing of the said de-*  
 “ *fendants, and trusting that they had made out or would*  
 “ *make out the said policy of insurance in conformity with the*  
 “ *said promises and undertaking*, and that they would duly  
 “ deliver the same to her when thereunto afterwards  
 “ requested, ‘ *considered*’ the ‘ *mortgage*’ on the said house  
 “ and premises, to the extent of three thousand pounds,  
 “ *fully and formally insured at the office of the defendants,*  
 “ *and acted accordingly.*”

“ That although the said defendants have been often  
 “ requested to deliver the said policy of insurance to the  
 “ said plaintiff, they, *by reason of alleged hurry of business,*  
 “ *delayed and put off* the delivery thereof *from time to time,*  
 “ *until the 8th day of July last past.*”

It is next alleged, “ that afterwards, to wit, on or about  
 “ the 8th day of July last past, the said buildings and pre-  
 “ mises were accidentally and by misfortune totally con-  
 “ sumed by fire, whereby the plaintiff sustained damage  
 “ to the extent of four thousand and thirty pounds currency,  
 “ and that the said fire did not happen by any foreign  
 “ invasion, &c., military or usurped power, or by any  
 “ earthquake or hurricane, *nor by any other of the causes*  
 “ *excepted by the terms of the said insurance.* Of which loss  
 “ the plaintiff forthwith gave notice to the said defendants,  
 “ and did also thereafter, to wit, on or about the 27th  
 “ September last, deliver to them, at their office in Mont-  
 “ real, a particular account thereof under her hand, and  
 “ verified by her oath, and did at the same time declare on  
 “ her oath that *no other insurance was made on the said pro-*  
 “ *perty by the said plaintiff,* except an insurance on the  
 “ *same on behalf of the plaintiff for nine hundred pounds*

“ *currency, and that no other insurance on the said property*  
 “ *existed, except an insurance by another mortgagee for two*  
 “ *thousand pounds currency, &c., with which preliminary*  
 “ *proof the said defendants declared themselves to be and*  
 “ *were content and satisfied, and waived all further proof of*  
 “ *said loss.*”

This declaration was demurred to, and the demurrer was overruled in the Court below.—The appellants have complained of this judgment ; but, as the declaration charges distinctly, that “ *they the said defendants did then and* “ *there, for and in consideration of the premium or sum of* “ *twenty-two pounds ten shillings currency to them, then* “ *and there in hand paid by the said Moses Judah Hays,* “ *acting as aforesaid, promise and bind themselves to insure,* “ *and the said defendants did insure, and become insurers to* “ *and towards the plaintiff;*” and as by the statute of the 12 Victoria cap. 38, sec. 87, all such like formal objections would be cured ; I concur in opinion with the Court below in rejecting the demurrer, and I am of opinion that the company was properly compelled to plead to the merits.

The company pleaded five exceptions to this action, by which in substance they set up, that 1st—They never made, and cannot make, any verbal contracts. 2nd—That if any insurance was effected by the respondent, it was in accordance with the conditions of the policies in use by the company, which had not been complied with by the respondent. 3rd—Want of insurable interest in Moses Judah Hays, by reason of a prior sale to M. V. Hays. 4th—Assignments made by the respondent of her hypothecque, subsequent to the supposed insurance, by which she was divested of her interest in the premises. 5th—The existence of older and preferential hypothecary claims on the part of other creditors, to an extent beyond the value of the buildings and property in question.

To some of these exceptions, special answers were put in by the respondent ; she also demurred to the exceptions,



and the Court below by its judgment of the 28th February, 1854, "considering that the defendants in and by their said "exception, sixthly pleaded, do not allege or set forth any "answer or thing sufficient in law to entitle the defendants "to the conclusions by them therein taken for the dismissal "of plaintiff's action, in the manner and form in which the "same hath been instituted, maintaining the answers in "law to the said last mentioned exception, doth dismiss "the said last mentioned exception" that is overruled. This exception is the one by which the company alleged, that "if even the said Moses Judah Hays had effected an "insurance, &c.," which the defendants do not admit, but formally and expressly deny, yet no other insurance could have been effected, save and except on the usual, ordinary and customary conditions contained in the printed proposals issued by the defendants, which are set out, and with none of which, it is alleged in the exception, the respondent had complied. The non-compliance with these conditions was sufficient to vacate a policy, either issued actually or only agreed upon; the *onus probandi* of compliance lay on the respondent, and she had even, in her declaration, alleged giving notice of loss, and the furnishing of preliminary proof, and expressly averred a waiver by the company "of all further proof of said loss." The usual, ordinary and customary conditions, must either have been dispensed with by the company, or there must have been a compliance with them on the part of the respondent. The declaration refers expressly to a policy. The terms and conditions of such policy would necessarily enter into any contract for insurance, written or verbal. The matter pleaded by this exception, was material to the action, and therefore, the parties should have been made to take issue upon it, and to proceed to evidence.

The respondent has contended, and it was ruled by the Court below, that this plea was defective, "because it "neither denied the allegations of the respondent, or "alleged affirmative matter in avoidance of them." By

this is meant that a hypothetical form is used, and not a positive statement. Every admission made in an exception is only to be taken hypothetically by the rules of the Roman law, as practised in Lower Canada. (1) The use of the conditional form, "if, &c.," only states the hypotheses in so many words, expressly, which the law would otherwise imply. The objection is only formal; and as to the form of pleadings, the 86th section of the 12th Victoria, cap. 38, cures all objections.

The undertaking of the company, as stated in the declaration, was to "cause a Policy of insurance to be made and executed in due form, embodying the conditions and stipulations hereinbefore in part recited." This exception states conditions and stipulations in due form. It refers to a printed proposal of the company, containing not a recital in part, but the whole of them in the entire. As the right of the respondent to recover depended upon her compliance with the terms and conditions of the contract, the statement of them contained in the exception was in the highest degree material, even if only as supplying what the declaration failed to disclose, or disclosed merely in part. The necessity for a replader upon this exception, might have been superseded if the questions submitted to the Jury who tried the case had been framed in such manner as to bring out all the main points involved in it.

The judgment of the Court below, in this respect, is manifestly erroneous. The appellants have complained of it, and I am clearly of opinion that it should be set aside and reversed, and that the appellant should be held to take issue upon this sixth exception, as it is called, though it is in effect the fifth. The respondent may set up specially in answer, that in this case the usual terms and conditions were departed from, that the risk was taken upon no other conditions than those mentioned in the declaration. The

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(1) Clarke and Johnston, 3 Lower Canada Reports, 421.

question would then arise, as to the authority under which the departure took place, if it was sanctioned by the company, and binding on the corporation. That question involves the whole case ; if answered in the negative, the company never was a party at all, and never was bound.

The statute of the 14 and 15 Victoria cap. 89, has changed the old law of trial by Jury in civil cases, which was in conformity with the practice in England, and has introduced into Lower Canada a system similar to that prevailing in Scotland. Distinct questions are propounded to the Jury, framed in such manner as to meet all the issues of fact in controversy between the parties, and a separate answer is taken to each question. The settlement of these questions is often a matter of nicety, and can properly be made only at a meeting of the law agents or counsel on both sides, in the presence of a Judge or some competent officer of the Court. In Scotland a practice has been laid down and followed in Jury trials, but hitherto there has been no settled practice in the Court below under our act. In some cases the Judges have framed the questions to be submitted to the Jury, in others they have been settled by consent, and in many, one of the parties, generally the plaintiff, has drawn up a series of questions which the Court has adopted. To make the operation successful, a correct analysis of the case is absolutely necessary, and the questions must embrace or comprehend all the material facts in issue. In the present case, the articulation of facts as it is called, as submitted by the plaintiff, was adopted by the Court below, by its order of the 28th June, 1855. I would have required in this case, distinct answers upon the material averments of the declaration. To leave out the verbal agreement between the respondent and Hays to insure, on condition of further delay, as mere matter of inducement or to give colour, I am of opinion that the Jury should have been called upon to say—

1st.—Whether any verbal agreement to insure was made by the company, and if so, by whom and in what manner.

2nd.—Whether this agreement was to be reduced to writing, in the shape of a policy.

3rd.—What were the conditions of such agreement, if they were not the ordinary printed conditions.

4th.—Whether the custom and ordinary course of dealing of the company, as to the issue of policies, was such as alleged in the declaration.

5th.—Whether William Murray made the acknowledgment alleged, and whether he was authorised either specially or by the accustomed usage of the office to make such acknowledgment.

6th.—Whether the premium was paid in hand by Hays, as alleged in the declaration, or whether his note was accepted, as pleaded in the special answer of the plaintiff, with the sanction of the Company.

7th.—Whether the plaintiff had complied with all the conditions of the insurance requiring fulfilment on her part.

8th.—Whether the premises were consumed as alleged.

9th.—Whether the hypothecary claim of the plaintiff was injuriously affected by such fire, and to what extent it was diminished.

10th.—Whether the Company waived proof of the loss as alleged in the declaration.

Instead of such questions, the Jury were asked generally :—

“ Did the defendants, on or about the 18th. February, 1852, insure, for one year from that date, in favor of the plaintiff as mortgagee thereof, to the extent of three thousand pounds currency, the four story cut stone building and theatre as described in the declaration ? ”

A complex question, framed as this is, makes the jury dispose both of the law and the fact by a "yes" or a "no," and is destructive of the object in view by the Legislature, in requiring distinct questions. The Court below, in my opinion, should not have permitted a question to be put in such form. The respondent, by the adoption of her articulation of the facts, obtained an undue advantage over the Company, fatal to the justice of the case. But the evil does not rest here, although the exceptions set up, among other things, such salient facts as the want of insurable interest in the respondent, by reason of her two assignments of her hypothecque; the abandonment by Moses Judah Hays of his proposal to insure, as also the existence of anterior hypothecary claims upon the property preferable to hers, and absorbing the interest of the respondent in the entire, no questions whatever were framed either upon this or the other points raised by the exceptions or the special answer. It is obvious, that by this mode of proceeding, the defence was excluded from consideration in important particulars, and the issues between the parties were lost sight of, the investigation being confined almost within the limits of the first pleading—the declaration. I cannot view the course pursued in the Court below, otherwise than as subversive of justice between the parties, at the same time that it is repugnant to the spirit of the statute. I am therefore of opinion, to set aside the order made in the Court below, on the 28th June, 1855, defining the facts to be submitted to the Jury, and in lieu thereof, to order that the parties attend before one of the Judges, at Chambers, and that questions suited to the issues, and covering all the facts material to the case and in controversy between the appellants and respondent, be prepared and settled in order to a new trial, should either of the parties demand it.

I come now to the trial, to the rulings of evidence and to the charge of the learned judge who presided. It is to be noticed at the outset, that although "in proof of all facts

“ concerning commercial matters, recourse is to be had, in  
 “ all the Courts of Civil Jurisdiction in Lower Canada, to  
 “ the rules of evidence laid down by the laws of England”  
 as provided by the old ordinance of the 25 George III, cap.  
 2, sect., 10, yet the law governing the contract is not the  
 law of England but that of Canada. Insurance upon houses  
 and buildings, *assurance terrestre*, as it is called, was  
 unknown to the law of France, as it obtained here at the  
 conquest. The practice of such insurance has sprung up  
 in France since 1759. We must look to modern works as  
 written reason upon the subject, but in doing this we are  
 not more to be confined to modern French writers and le-  
 gislation than to English or American treatises, old or new.

Whether a writing is, as Pothier would term it, of the  
 essence of the contract of insurance, or not, beyond doubt it  
 is of the nature of the contract, which indeed has been  
 called *le contrat de police d'Assurance*.

“ Insurance, as a branch of the law merchant, we have  
 “ already seen (says Duer, vol. 1, p. 60, edition of 1845,)   
 “ does not depend solely on the rules of our Municipal law,  
 “ but upon questions not settled by positive decisions, is  
 “ governed by the general usage of the commercial world.  
 “ Hence I adopt the opinion that the general and uniform  
 “ practice of merchants, from the earliest times, ought to  
 “ be considered as evidence of the *legal necessity of a writ-*  
 “ *ten contract*, with the same propriety that a bill of sale is  
 “ held by the universal maritime law, to pass a valid title  
 “ on the transfer of a ship. There has been no express  
 “ decision on this point in any of our Courts, nor is there  
 “ more than a single case to be found in our reports, where  
 “ the question has been agitated, and in this the Judges  
 “ finding they could place their decision upon other grounds  
 “ purposely abstained from expressing an opinion.”

Casaregis is a great authority upon the practice of Mer-  
 chants and Commercial law. From the “ earliest times,”

he says "In materiâ assecurationis principaliter inhæren-  
 "dum est *verbis apocæ assecurationis*, quinnimo *hæc pro lege*  
 "*habenda sunt*, nec ab his recedere debemus, quia contra-  
 "hentium voluntas melius haberi non potest, de commer-  
 "cio." Discursus No. 1, Vol., 1, page 4, Venetiis 1740.

The ordinance of Barcelona of the year 1484 expressly enacts, not only that the contract shall be reduced to writing, but that the instrument be executed before and be signed by a public Notary, and that all Insurances otherwise made are to be considered wholly void. Le Guidon. p. 187 holds writing indispensable. Emerigon. Assur. cap. 2 sect. 1, says, "l'écriture est un point de rigueur et qu'à son défaut on ne peut, quelque modique que soit la somme et dans aucun cas, ni admettre la preuve par témoins, ni *faire interroger la partie, ni l'appeler à serment.*"

The ordonnance de la Marine, title 6, article 2, says "Le contrat appelé police d'assurance sera rédigé par écrit et pourra être fait sous *signature privé*," in this latter point, altering the provision of the ordinance of Barcelona, requiring the presence of a notary and a notarial instrument. It is true that no traces are to be found in the old french registers in Canada of the registration, in this country, of the ordonnance de la Marine. But I have always thought that as we had a *Cour et Jurisdiction d'Amirauté* in the old french times in the colony, of necessity, a law so celebrated as the great ordinance in question, must have been commonly acted upon here, as it is adopted, in the usage of every maritime country, as written reason. The injunction that "le contrat sera rédigé par écrit," again, was only in affirmance of existing law, and not introductory of any new legal provision. Under the modern law, Alauzet des Assurances Vol. 1, No. 180, after stating the danger of permitting assurance to be effected otherwise than by a writing, says "ces motifs, qui militent pour la nécessité de l'écriture, ont une gravité qu'il est impossible de mécon-

"naître," and strongly approves of the article of the modern code to that effect.

Merlin,—*Repertoire de Jurisprudence*, vbo. *Police d'Assurance*, while contending that under the rule laid down in *Le Guidon*, a verbal Insurance was not in itself null, admits that it was necessary to have a writing "pour faire constater de l'existence de la convention entre ceux qui voudraient la nier."

In Great Britain and the United States, the law does not directly and positively prescribe the form of this contract or the mode in which it is to be executed.

"The english statutes requiring the assured in certain cases to be named in the policy, imply that the contract must be in writing."—1 Phillips on Insurance, p. 8. "It is very probable" (says Marshall on Insurance, p. 349) "that the form of a Policy of Insurance, nearly similar to that which we have now in use was introduced into England by the Lombards, with their other commercial improvements."—4 B. & A. 210 "Though a Policy of Insurance not being under seal, is but a simple contract, yet it is always looked upon as an instrument of great solemnity, being the *only evidence* of contract of the utmost importance to the parties interested." At page 352, he says, "it is indeed a general rule, that the policy alone shall be conclusive evidence of the contract, and that no parol evidence shall be received to vary the terms of it."

As to the law of Scotland, it is laid down, that the contract must be by policy, on stamped paper. But the agreement may be so conclusively fixed before delivery of the Policy, as to ground an action for *implementing* it by the furnishing of a regular policy. Bell's principles of the law of Scotland, page 508. In the United States, in the case of the Baptist Society and the Brooklyn Fire Insurance Company, Gardner, Chief Justice, said, "we have been referred to no case in which a contract of insurance without



"writing has been sustained by our Courts, and the remark has been repeated by elementary writers, by distinguished Judges and Counsel, that no such instance can be found. (1) In the cases from Cowen and Howard, cited by the respondent's counsel, (2) the agreements were in writing, and, in the first mentioned, the controversy was in respect to the authority of an agent who assumed to contract for the Corporation. In Sandford, vs. the Trust and Fire Insurance Company, (3) the Chancellor observed, that he was not prepared to say that in this State, there might not be a valid contract founded upon a good consideration to execute a written policy which equity may enforce. He admits, that the custom so far as he could ascertain, was to have written evidence of the contract."

The declaration in this case in some respects resembles a bill in equity in its averments, but the *conclusions* or aid prayer shew that the suit was not brought to "implement," but that it is an action on a supposed "*verbal*" contract. Of such an action Angell in his book on Insurance, p. 57, § 19, says, "In this country, no statute in any State requires that the contract should be in writing, but the opinion has been entertained and expressed, that as the usage of a contract in this form has long and universally prevailed, it has probably acquired the force of law, and that it is doubtful whether an *action on the contract* if merely *oral* could now be sustained."

In our Courts and under our law, whereby justice is administered, by the same tribunal and in the same form, without reference to common law jurisdiction and equity, the respondent, in the ordinary course, might have commenced by examining the appellants on interrogatories "*sur faits et articles*" and have thus compelled the Company to

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(1) 3 Kent's Com., 321, 7 ed.

(2) 4 Cowen, 646:—9 Howard 399

(3) 11 Paige's R., p. 556

admit upon the record the contract which she set up and was desirous of enforcing. In our practice, this examination might have been read to the Jury, if the respondent elected to use it in evidence. The course pursued at the trial was different, and the respondent insisted upon proving by witnesses the oral or verbal contract, asserted in the declaration.

The company objected to this course, but the presiding Judge overruled the objection and permitted oral testimony *de plano*. In support of this objection, the counsel for the company have relied specially upon the terms of its charter as stated in the provincial ordinance and the statute of Incorporation above mentioned. It has been urged that the company is incapable of contracting, and cannot be bound otherwise than by a policy in writing, signed by the directors and executed as prescribed by the Legislature. The case of *Head et al, vs. the Providence Insurance Company*, (1) has very properly been insisted upon, as furnishing a rule to be found in all the American books on the subject of Insurance, and considered to be unquestionable. In this case Chief Justice Marshall says, "It is a general rule that a Corporation can only act in the manner prescribed by law. When its agents do not clothe their proceedings with those solemnities which are required by the incorporating act to bind the company, the informality of the transaction, as has been very properly urged at the bar, is itself inducive to the opinion that such act was rather considered as manifesting the terms on which they were willing to bind the Company, as negotiations preparatory to a conclusive agreement, than as a contract obligatory on both parties." With more immediate reference to the facts of the case before him, this learned judge proceeds further; "this leads us to inquire whether the unsigned note of the 6th. of September, be a corporate act obligatory on the company. Without ascribing to this

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(1) 2 Cranch 166.

" body, which in its corporate capacity is the mere creature  
 " of the act to which it owes its existence, all the quali-  
 " ties and disabilities annexed by the common law to an-  
 " cient institutions of this sort, it may correctly be said to  
 " be precisely what the incorporating act has made it, to  
 " derive all its powers from that act, and to be capable of  
 " exerting its faculties in the manner which the act autho-  
 " rises. To this end of its being, then, we must recur to  
 " ascertain its powers and to determine whether it can cre-  
 " ate a contract by such communications as are in this  
 " record. The act after incorporating the Stockholders by  
 " the name of the Providence Insurance Company, and  
 " enabling them to perform, by that name, those things  
 " which are necessary for a corporate body, proceeds to  
 " define the manner by which these things are to be per-  
 " formed. Their manner of acting is thus defined " Be it  
 " further enacted that all policies of assurance and other  
 " instruments made and signed by the president of the said  
 " company, or any other officer thereof, according to the  
 " ordinances, by-laws and regulations of the said company,  
 " or of their board of directors, shall be good and effectual  
 " in law to bind and oblige the company to the perform-  
 " ance thereof, in manner as set forth in the constitution of  
 " the said company hereafter recited and ratified."

" An instrument then to bind the company must be signed  
 " by the president, or some other officer, according to the  
 " ordinances, by-laws and regulations of the company or  
 " board of directors. A contract varying a policy, is as  
 " much an instrument as the policy itself, and, therefore, can  
 " only be executed in the manner prescribed by law. The  
 " fate of the policy might indeed have been terminated by  
 " actually cancelling it, but a contract to cancel it, is as  
 " solemn an act as a contract to make it, and to become  
 " the act of the company must be executed according to  
 " forms in which, by law, they are enabled to act. It  
 " appears to the Court that an act not performed according  
 " to the requisites of law cannot be considered as the act

“ of the company, in a case relating to the formation or  
 “ dissolution of a policy. If the testimony of Mr. Jackson  
 “ is to be understood as stating that an assent to the forma-  
 “ tion or dissolution of a policy, if manifested according  
 “ to the forms required by law, is as binding as the actual  
 “ performance of the act agreed to be done, then the prac-  
 “ tice he alludes to is correct. But if he means to say that  
 “ this assent may be *manifested by parol, the practice cannot*  
 “ *receive the sanction of this Court.* It would be to dis-  
 “ pense with the formalities required by law for valuable  
 “ purposes, and to enable these artificial bodies to act and  
 “ contract in a manner essentially different from that pres-  
 “ cribed to them by the legislature. Nor do the cases  
 “ which have been cited by the gentlemen of the bar, appear  
 “ to the Court to apply in principle to this. An individual  
 “ has an original capacity to contract and bind himself in  
 “ such manner as he pleases. For the general security of  
 “ society however from frauds and perjuries, this general  
 “ power is restricted, and he is disabled from making  
 “ certain contracts by parol. This disabling act has received  
 “ constructions which take out of its operation several cases  
 “ not within the mischief, but which might very properly  
 “ be claimed within the strict letter of the law. He who  
 “ acts by another acts for himself. He who authorises  
 “ another to make a writing for him, makes it himself, but  
 “ with these bodies which have only a legal existence, it  
 “ is otherwise. *The act of incorporation is to them an*  
 “ *enabling act, it gives to them all the power they possess, it*  
 “ *enables them to contract,* and when it prescribes to them a  
 “ mode of contracting, they must observe that mode, or the  
 “ *instrument no more creates a contract than if the body had*  
 “ *never been incorporated.* It is then the opinion of this  
 “ Court, that the circuit Court erred in directing the Jury  
 “ that the communications contained in the record in this  
 “ cause, amounted to a contract obligatory on the parties,  
 “ and therefore the judgment must be reversed and the  
 “ cause remanded for a new trial.”

In the case of the Baptist Society and the Brooklyn Fire Assurance Company above referred to, chief justice Gardner, after citing this last case from Cranch with approbation, as also the 12 Wheaton 63, and 7 Cowen 464, says; "There is no ambiguity in the provision of the defendant's charter. It embraces every contract directly affecting the business of insurance. If the object of that provision, as the defendant insists, was to enable the corporation to dispense with a seal, the mode of execution substituted by the legislature shows clearly that they did not intend to dispense with *a writing as the evidence of the contract of insurance*. It is said that the provision is merely directory. That this supposed a corporation first created with a general power to make insurance to which this particular provision was superadded, of which it might avail itself or not at its election. The answer is that a corporation with the limited capacity of contracting in the mode prescribed was the being, and nothing else, created by the statute."

The like doctrine is to be found in the french books, Boudousquié de l'Assurance No. 85, after speaking of contracts made by an agent in contravention of particular instructions, but not inconsistent with the public acts by which a company has been created, or the regulations framed for its constitution, as for instance, accepting a lower rate of premium than that in the tariff, and holding such contracts to be binding against the company, saving the recourse over against the agent, says No. 86, "mais la question doit être jugée différemment lorsque les conditions, auxquelles il a été contrevenu, sont celles qui résultent des statuts approuvés par le gouvernement, *ces statuts étant rendus publics par l'insertion au bulletin des lois*, qui a lieu en même temps que celle de l'ordonnance d'autorisation, la compagnie au nom de laquelle le contrat a été souscrit est fondée à prétendre, premièrement, *que ces statuts contiennent les conditions de son existence*, conditions imposées par le gouvernement dans l'intérêt public,

*“ et auxquels il n'est pas permis de déroger, en second lieu, que l'assuré est présumé avoir connu ces statuts et les restrictions qu'ils apportent aux pouvoirs de l'agent, puisque nul est censé ignorer la condition de celui avec lequel il contracte. L'assurance dans ce cas est donc nulle en ce qu'elle a de contraire aux statuts, sans même que l'assuré puisse exercer un recours contre l'agent.”*

M. Justice Smith, in his charge to the jury in the Court below, observed; “ No authority in law was cited to shew that a verbal contrat of insurance cannot take effect, nor to establish the ground taken by the defendants that such a contract must be in writing.” It would seem to me that it was for the respondent to have shewn that such a contract might be made with this chartered Company, consistently with its charter, without writing. The learned Judge adds, “ Authorities from the French law have been cited, but these are not applicable, the contract is a commercial contract, and is governed by the English law.” A more dangerous error than this could not be committed; commercial contracts, like all others, are governed here by the law of Lower Canada. It is in proof only of commercial matters that the “ rules of evidence ” of the law of England are to be resorted to. M. Justice Smith then proceeds to state, “ I see nothing in the English law to shew that the contract cannot be *made and proved* without a writing, and I hold that it can be proved without any writing.” On this head I must differ entirely from the learned judge. I am of opinion, that under no system of law, English or French, was oral evidence admissible, and that it should have been excluded, as was contended by the company, until properly let in by documentary evidence of some sort. This ruling and direction of the learned Judge would alone suffice, in my judgment, to reverse the proceedings at the trial, and the judgment of the Court below.

The appellants objected to the competency of Moses Judah Hays as a witness, and this objection was also over-

ruled at the trial. With reference to Hays, it is to be noticed that the declaration alleges a verbal agreement between him and the respondent for delay of payment on condition of effecting insurance.

This contract is not one of a commercial nature, the agreement is stated as between a *créancière hypothécaire* under a notarial obligation and the debtor, to extend the term of payment; evidence of such a contract must be in writing under our law, and above all a party contracting was incompetent to testify. He was objected to on the ground of interest in the event of the suit. Had he such an interest as to disqualify him? How does he stand affected by a judgment favorable to the respondent? How does he stand with a judgment adverse to her? If he is to be viewed irrespectively of his sale of the property in question to his son, whatever the company may pay to the respondent upon this transaction, is so much in deduction or diminution of his debt to her. By charging the company he compels it to discharge his liability to the respondent, *pro tanto*. Viewing him in the light of a vendor to his son, a judgment favorable to the respondent will entitle him to be paid by the vendee so much which otherwise the respondent would have received from such vendee. The question of insurance or no insurance, is one in which he has a direct and immediate interest to the amount of the risk taken, or supposed to have been taken. There is no corresponding liability over to the company to neutralise this interest, as has been contended for. I am therefore of opinion, that Hays was not a competent *witness*, and that the ruling of the learned judge, to the contrary, was erroneous and should be reversed.

The evidence of Hugh Taylor was also objected to by the appellants. The assignments made to him and by him, in question in the cause, are matters governed by the law of Lower Canada, under no circumstances to be called commercial matters. The form of these contracts is the

notarial form of the country. Under our law Taylor was incompetent to prove the *contre-lettre* produced by the respondent; the time of its execution, *la date*, should have been proved by other witnesses. *Nemo idoneus est testis in rem suam*, leg. 10, dig., de testibus. *Reprobatur quoque testimonium eorum quos respicit negotium de quo controversitur.*

The admission of this testimony in my opinion was improper, and, in this respect again, I view the judgment of the Court below as erroneous and would reverse it.

The objections made at the trial by the Counsel for the appellants, to the evidence of the honorable Peter McGill, Hugh Taylor and Moses Judah Hays, as to admissions of Mr. Murray, not being part of the "*res gestæ*," I consider valid, and would reject all such admissions as improperly received in evidence.

It is impossible to avoid noticing the latitude allowed in the examination of the witnesses generally, but particularly in that of Mr. Taylor, as to hearsay statements, such as, "Mr. McGill told me he had just seen Mr. Hays and he had told him it was effected." "At Mr. McGill's request I went over to Mr. Murray's office and saw him, and inquired if the insurance had been effected, he told me it had been effected, and said, tell Mrs. Reid the insurance has been effected, the mortgage is covered."

The evidence of the honorable George Moffatt, of William Molson, Joseph Jones and John H. Maitland, as to deviation from the condition of the policy requiring payment of premium, and as to things practised in other offices in effecting insurance, I hold also to have been most improperly received. No bad usage of the description sworn to, even if established as existing in other offices, could bind the appellants. Negligence and mismanagement in the conduct of the business of insurance companies, cannot be tolerated in Courts of Justice, when set up in excuse for the



violation of cardinal rules, and the evidence thus adduced only tended to prove the existence of an abuse on the part of the agents and servants of insurance companies, dangerous alike to their employers and to the public at large.

In his charge to the jury, the learned judge laid great stress upon the entry in the book produced by Mr. Murray.

Now this entry was cancelled, the witness so stated, when he produced it on his examination, and although the servant of the company, he was the witness of the respondent. His statement on the subject is. "The entry is in the hand writing of the late Mr. Macaulay. There is a cross marked across the face of this entry. It was done about the 10th. or 11th. of March, by the late Mr. Macaulay, by instructions. It was cancelled in the month of March." Under the heading, "total amount of premium received," in one of the columns of the book, the word "null" is inserted opposite to this entry, and the figures "22 10" "amount of premium" and £3000. "Sum insured in, are crossed over." The learned judge is silent as to the cancellation of the entry, and directs the jury to treat it as a subsisting entry. The respondent, however, did not so treat it, for the declaration proceeds upon a verbal contract throughout, and not upon any writing or entry.

Let us suppose, that, instead of this entry, a policy actually signed and sealed in due form, had been produced, but written over, cancelled and marked "null," could such a document have been treated as a subsisting instrument? It was not pretended that there was fraud in the cancelling of this entry, it was done long before the burning of the house, not by Murray, the witness and agent, but in the handwriting of a clerk, who no doubt, would have been produced as a witness at the trial had he been living.

Another portion of the charge is, "there is but one real issue, was the contract a contract conditional or not?" I must confess my surprise, that in a case presenting so many

and so grave points, and with a defence such as that set up by the company, that defence should have been so lost sight of, and the existence of a contract at all assumed by the judge as beyond doubt. " Was the note to be paid before the policy issued, or was the contract completed at the time ? This is the *sole question as to the contract*. The practice of other offices is of little consequence. They are shewn to be different in each office, each having its own way of conducting its business. The entry in the defendant's books is what you have to look to. This, the manager cannot destroy. It must be *presumed to bind the company*, to have been made under the eye of the directors, to have been before them at every one of their meetings. The entry for the premium is made as cash, and appears in the column of cash paid for premiums on policies. Mr. Murray's evidence cannot shake it. *If he gave credit, it was at his own risk* ; if he gave credit to Hays, this credit cannot invalidate the contract, or could not affect the plaintiff's interest in the insurance.

Supposing the book in question to have been before the directors at every one of their meetings, actually and not figuratively, the entry, originally, would have been as so much received in cash, that entry then would have deceived the directors, afterwards the entry would appear as cancelled, and the receipt of cash would have been negatived. But it is assumed in the charge that Mr. Murray was authorised to accept something else in lieu of cash, and that his acceptance of a note bound the company. Now we have Mr. Murray's uncontradicted testimony to the fact. " *It is not the practice to give credit on fire policies*, with the exception of some wholesale houses with whom we run accounts for the year, but they *always receive their receipts and policies at the same time*. In these cases it is only done with houses who have accounts with us for marine insurance. May have deducted premium from losses which were charged in an account, but do not recollect

"any case." It is to be observed that no attempt was made by the respondent to prove the allegation in the declaration, "that it was then, and for many years before had been and still is, the custom and ordinary course of the defendants, not to issue any scrip or policy for insurances effected by them, for many weeks and even months after the time of effecting such insurances."

A custom "not to do" would be difficult to prove, but if established, it would only show neglect of duty on the part of the company's servants, and would not operate a repeal of their rules and regulations and of the provisions of law respecting a writing signed and sealed. It was for the respondent to have shewn authority in Murray to accept a promissory note in his own favor and to treat it as cash paid to the company and binding them to the issue of a policy or liability for risk. No such authority has been shewn, "if he gave credit it was at his own risk," it may have been at his own individual risk and personal responsibility. "If he gave credit to Hays, this credit cannot invalidate the contract", it is said, but a contract is again here assumed by the company which can only be evidenced by a policy, and depend upon that instrument as perfected by the seal for its very existence. The jury were in effect given to understand that the acts of Murray, of all kinds, bound the company, and that authority on his part was to be presumed in opposition to the by-laws and the charters. I am of opinion that authority to this extent could neither be granted by the directors, nor exercised by Murray, consistently with the act of incorporation, or the law of corporations. The agent of a corporation represents an *ens rationis*, those who contract with him must know that the principal is the creature of the law, whose language is writing, and whose consent can only be evidenced and given as the law directs. Payment of the premium is a cardinal condition of every risk, to allow a servant or agent to dispense with it altogether or in any way to modify it by his own will, would be to confer

more power on the servant than what the law has vested in the master. The evidence of M. Murray explains the transaction intelligibly and consistently. He took a promissory note at a short date upon an undertaking personal to himself that the company would pay a loss occurring in the interval between its date and maturity. If a loss had occurred during this interval, M. Murray trusted that it would be made good by the company. The board of directors might have resolved to do this, but the company could be bound by charter only by a vote of the stockholders at a general meeting.

The charge in another part of it is that "if doubts remain  
 "and you find it difficult to come to a decision, you may  
 "discard both sets of statements, and fall back upon the  
 "book as containing itself evidence which cannot deceive,  
 "and which binds the defendants."

But the book was only kept for the entry of orders for insurance, there is no regulation of the company giving binding efficacy to its contents, and the defendants can alone be bound in manner and form prescribed by the statute. In my opinion this is a plain misdirection. The entry as it stood originally was calculated to mislead and to deceive, by representing, as cash paid, that which was never paid, and of which only a worthless piece of paper was given as the representative. That the company could be bound by an entry contrary to the fact is impossible, but that it should be bound by such an entry after it had been cancelled, and after the worthless note had matured and been protested, is not to be argued.

The charge again lays down. "If you take the contract  
 "as a conditional one, but as made with the plaintiff, the  
 "condition being the payment of the premium before a policy should issue, then I think it was the duty of the defendants to have given the plaintiff notice of the non-payment of the note." If such were the duty of the company,

the question of compliance or non-compliance, should have been one of the questions in writing propounded to the jury. Though not so put, the Jury were called upon to resolve this question, by a general finding in favor of the respondent in answer to the last question. But I must again view this direction, in the light of a mis-direction.

Actual payment of premium is a condition precedent to the risk. Delay to pay when expired, if payment be not made, places the parties where they were originally. M. Murray is supposed to have said, this note, if paid at maturity, will be treated as so much cash at its date. But the note was duly protested, and notice of non-payment was given to Hays the maker.

Now according to the theory of the respondent, herself, Hays was her agent, and represented her in this transaction.

M. McGill in his evidence, says, that he did not act as the agent of Mrs. Reid.

M. Hugh Taylor says the same thing. Both of these gentlemen took an interest in Mrs. Reid's transaction with Hays as friends, but no more. Mrs. Reid had but one agent in the transaction, and that agent was Hays. Why then can it be doubted, whether notice to him under the circumstances was notice to the principal. She contracted with Hays to have this insurance effected. She trusted to him to have it done, if any party is to suffer by his default or neglect, should it not be the party who employed him and who trusted him? She trusted him to effect the insurance; she trusted to him to pay the premium; to him alone she must look if no insurance was effected. Notice to him was notice to her, and the company, in my opinion, could not be called upon to make a demand on her for the premium. The seventh of the printed conditions of the assurance at the company's office, is "no order for insurance" will be of any force, unless the premium is first paid to

" the office, and all persons desirous to continue their insu-  
 " rance must make their *future payments on or before the day*  
 " *limited by their respective policies, or the same will be void.*"  
 The rule here is *dies interpellat pro homine*, and the rule be-  
 came more stringent, if payment of the note be a condition  
 precedent to the granting of a policy. The premium is to  
 be paid at the office. " Si le lieu ou la prime doit être  
 " payée n'est pas désigné dans la police, les assureurs sont  
 " obligés d'envoyer chercher la prime chez leur débiteur  
 " qui n'est obligé à rien autre chose qu'à se tenir prêt à  
 " payer au terme fixé, et non à faire ses offres. C'est donc  
 " aux assureurs à constater par une sommation qu'ils ont  
 " envoyé chercher la prime et qu'ils n'ont pas trouvé leur  
 " débiteur prêt à payer. Si au contraire la prime est portable,  
 " l'assuré est obligé de faire ses offres et de les constater,  
 " faute de quoi la demeure est acquise, et le droit à la réso-  
 " lution du contrat ne peut plus être enlevé aux assureurs  
 " par des offres postérieures." (1) Payment of the pre-  
 mium was to be made by Hays and not by the respon-  
 dent; payment was demanded of him accordingly, and  
 the protest against him is all that the company were  
 bound to do, supposing a recognition by them of the  
 whole transaction between their clerk and Hays. The con-  
 cluding part of the charge to the jury, seems to me more  
 incorrect, if possible, than any other direction given by  
 the learned judge. " It was contended (says the learned  
 " judge) that if in this case a contract of assurance was  
 " made, it was made subject to the usual conditions of the  
 " defendants' policies, as proved in the form produced by  
 " them. On this point also, I am against the defen-  
 " dants. The conditions cannot enter into the contract as  
 " made in this cause, *there being no mention of any such*  
 " *condition*, as no Policy was issued." I am constrained to  
 say, that this doctrine, is, to my apprehension, truly sin-  
 gular. That a clerk or manager in the company's office  
 can have the power to dispense with the condition of their

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(1) *Quemault, des Assurances*, 146.

policies, one and all, and unconditionally bind them to an assurance without policy, seems to me, at variance with every recognized principle on the subject of corporations of insurance, and of the power of agents to bind their principals. The respondent, so far from alleging an unconditional assurance, professed in her declaration to make mention in part of some conditions. She sets up a promise to give her a policy in writing, what policy did she stipulate for, if not the policy in use by the company? If it were a peculiar policy differing from others, was it not for her to say so and to state wherein consisted the difference. The *onus probandi* of compliance with the conditions of the risk is on her; shall she be exempted from making this proof by omitting to allege the conditions? M. Angell in his work on insurance, page 75, mentions the case of *McCulloch vs. the Eagle Insurance Company*, from the 1st. Massachusetts Reports, 278. "An action was brought against a company on an alleged consummated agreement to insure, contained in correspondence which the Court did not think sufficient proof of such contract, it was held that an action of assumpsit was not the proper form of action, but that it should have been special, stating as a breach, the refusal of the defendants to deliver the policy according to the terms of the agreement, *setting forth also the terms in which the policy ought to have been made, shewing that the loss claimed would have been recoverable under it, and alleging as a special damage that the plaintiff had been deprived of the remedy the policy would have given. And to enable the plaintiff to recover, he would be bound to give the same evidence as if the action had been founded on the policy itself. Evidence of a compliance on his part with all the conditions which the policy, if executed, would have imposed.*"

A bill in equity would also of necessity set forth the terms on which the policy ought to have been made. The declaration contains a statement that the loss occurred not "by any foreign invasion, &c., nor by any other of the

"causes excepted by the terms of the said insurance." That there were terms is certain by the effort made by the respondent to prove the allegation that she had given "due notice of the loss verified by oath, and that no other insurance was made on the property except &c., with which preliminary proof the said defendants declared themselves to be and were content and satisfied, and waived all other proof of such loss."

Why make this preliminary proof, and why allege waiver, if the conditions cannot enter into the contract as made in this cause, there being no mention of any such condition, as no policy was issued?

As to the proof of the extent of the loss, the charge is to this effect: "as to the point of the property being mortgaged above its value, giving the defendants the benefit of the principle invoked by them, Hays swears the property was of the value of £24,000. The mortgage rights which the defendants are bound to have proved, are mortgage rights clear, uncontested and enregistered, and not litigated rights and claims of mortgage, that part of the defence therefore falls to the ground." The *onus probandi* is here laid down as being on the company. But it was for the assured to prove how much she had lost by the injury done to the buildings. Her *hypothèque* was upon the ground as well as upon the buildings. To assume the estimate of Hays, (an incompetent witness though he be) would be to negative the fact of any loss to the *hypothèque* at all. Enough would remain after the fire to secure the amount of the *hypothèque*. A *ventilation* could alone establish the respective value of the ground and the buildings; and as to the *rang et ordre* in which the respondent's *hypothèque* stood relatively to other creditors, anterior or subsequent *en titre d'hypothèque*, it was proper to shew it, to make proof of any loss at all. If there existed *hypothèques*, prior to her's, covering more than the value of the buildings, together with the ground, she lost nothing by their destruction, total.



or partial. Her *droit d'hypothèque* was worth nothing ; having lost nothing, she had no claim to indemnity under a contract of indemnity purely. As the appellants have adverted to the insufficiency of the proof of notice of loss, I am bound to express my opinion upon this point, and here I am again in their favor. I do not think that under the English rules of evidence, the hand writing and signature of the deceased clerk endorsed upon the exhibit No. 6, being proved, that paper should have been read to the jury.

Taking the evidence altogether, even as presented to the jury, the weight of it was in favor of the appellants, and the verdict seems to me to be against evidence. Upon the ground of misdirection, and the improper rulings of evidence adverted to already, I would have been prepared to set aside the verdict, if the appellants had moved to that effect. They have not done so, but the respondent has moved for judgment pursuant to the verdict. I think that she ought to have taken nothing by her motion, and that the judgment which has been entered up in her favor, is against law, evidence and justice.

I cannot understand how it can be possible to compel an insurance company to pay a loss without a policy, or conditions of insurance, and without a penny of premium.

The fact that the dishonored note remained with Mr. Murray seems to me to have no bearing on the case. It was not demanded by Hays or any one else ; and if demanded, Mr. Murray was justified in refusing to give it up, until payment at least, of the costs of its protest.

My opinion is, that the judgment of the Court below, should be reversed, with costs, that a repleader should be ordered upon the fifth exception, and that all the proceedings in the Court below, subsequent to the judgment of the 28th February, 1854, should be set aside and vacated, leaving the respondent to proceed further as she may be advised.

Sir L. H. LaFontaine, Bart., Juge-en-Chef.—Cette instance présente des questions relatives au contrat d'assurance. La principale question, en fait, est celle-ci : Dans les circonstances particulières de la cause, peut-on dire qu'une assurance a été réellement effectuée au profit de l'intimée au bureau de la compagnie ? La principale question, en droit, est celle de savoir si le contrat d'assurance peut subsister sans qu'il y ait une police.

La question de fait, soumise à un corps de jurés, a été résolue dans l'affirmative ; et le verdict ayant été homologué par la Cour de première instance, la question de droit se trouve également décidée dans l'affirmative par ce tribunal. La compagnie a interjeté appel, prétendant qu'il y a eu mal jugé en fait et en droit. A mon avis, la compagnie est dans l'erreur. Nous n'avons aucune loi qui fasse dépendre l'un écrit la validité du contrat d'assurance. Ce contrat est du droit des gens ; il peut donc exister indépendamment de la loi civile. Il est néanmoins au pouvoir du législateur de réglementer la forme de ce contrat en ce qui peut regarder l'admissibilité ou l'inadmissibilité de la preuve de son existence, et alors le contrat participe du droit civil ; mais nos lois municipales ne contiennent aucun règlement à cet égard. La compagnie a appelé à son secours quelques statuts anglais, qui ne sont que des édits bursaux, ayant pour objet l'établissement d'un droit de timbre. C'est en vain qu'elle invoque ces statuts, puisqu'ils n'ont pas force de loi en Canada. L'on sait que l'ordonnance de marine, (art. 2, titre des assurances) portait que "le contrat appelé *police d'assurance* sera rédigé par écrit." Suivant Pothier (1) cette forme n'est pas nécessaire à la validité du contrat, et ne peut être requise que pour la preuve.

"Les raisons qui me portent à croire que cette forme que l'ordonnance prescrit, n'est que pour la preuve, et non

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(1) *Assurance*, No. 96.

pour la validité du contrat," dit Pothier, "sont, 1o. que cette forme est absolument étrangère à la substance du contrat, 2o. que l'ordonnance ne la requiert pas *à peine de nullité*." Au reste, l'ordonnance de marine n'a pas été enregistrée en Canada. Il est vrai que l'ordonnance de 1667 qui l'a été, exige (art. 2 du titre 20) "qu'il soit passé acte pardevant notaires ou sous signature privée, de toutes choses excédant la somme ou valeur de cent livres." Mais cette disposition générale est suivie de l'exception suivante, (même art.), "sans toutefois rien innover pour ce regard, en ce qui s'observe *en la justice des juges et consuls des marchands*," c'est-à-dire, en d'autres mots, en affaires commerciales. Je crois donc avoir eu raison de dire qu'aucune de nos lois municipales ne réglemente le contrat d'assurance, et que, comme le remarque Merlin (1), après Pothier déjà cité, "il est évident (sous l'ordonnance de marine) que l'écriture n'était nécessaire que pour faire constater de l'existence de la convention contre ceux qui auraient voulu la nier." (2) Il me semble même que dans ce dernier système, l'assuré devait être admis au bénéfice d'un *commencement de preuve par écrit* s'il en existait, ou du serment judiciaire pour obtenir de sa partie adverse l'aveu de l'existence du contrat. "Il y aurait abus," dit Alauzet, "à établir contre la vérité et la nature des choses, que l'assurance elle-même n'existera que sous ces conditions, (conditions exigées par une loi pour la preuve) et qu'une des deux parties pourra convenir de la vérité de toutes les assertions de l'autre, et se refuser à exécuter le contrat parce qu'il n'aurait pas été écrit."

Telle est mon opinion sur la question de droit. Quant à la question du fait de l'assurance, je crois que la décision du jury est exacte et conforme à la juste appréciation qui doit être faite de la preuve. Il est certainement à regretter de voir autant de contradictions qu'il y en a entre le témoignage de M. William Murray, l'agent ou gérant (*Manager*)

(1) Rép., vbo. Police d'Assurance.

(2) 1 Alauzet, No. 181 :—Grun et Joliat No. 197 :—1 Phillips, 2nd Ed. p. 8.

des appelants, d'un côté, et celui de l'Hon. Peter McGill, de M. Hugh Taylor et de M. Hays, de l'autre. Mais, dans l'état de la cause, les assertions isolées du premier, ne sauraient, à mon avis, l'emporter sur celles des derniers, qui toutes concordent les unes avec les autres, se prêtent un mutuel appui, et, de plus, empruntent un nouveau degré de crédibilité, du fait qu'il existe un écrit constatant qu'une assurance avait été réellement effectuée au bureau de la compagnie au profit et au nom de l'intimée. Nous verrons bientôt si cette assurance, admise par M. Murray lui-même, était une assurance qui, comme il le prétend, n'a duré que quelques jours, ou si au contraire c'était une assurance qui devait durer une année.

M. Hays devait à Madame Reid, l'intimée, une somme d'environ £4000, pour la sûreté de laquelle il lui avait constitué une hypothèque sur son grand hôtel de la rue Notre-Dame dans la Cité de Montréal, connu sous le nom de "Maison Hays," lequel hôtel fut détruit par le vaste incendie de 1852. M. Hays, qui s'y était engagé envers l'intimée, obtient le 18 février précédent, au bureau des appelants, une assurance sur cet hôtel, au nom de sa créancière, au montant de £3000. De la part des appelants, cette assurance est consentie par l'entremise de leur agent ou gérant, le dit William Murray, qui fait faire aussitôt, dans un registre tenu à cette fin par la Compagnie, une entrée qui constate, en substance, que l'assurance est faite pour une année à courir du 18 février 1852, au nom de l'intimée et pour son profit, sur l'hôtel en question qui est spécialement désigné dans cette entrée ; que cette assurance est donnée sous le No. 8951, dans l'ordre des Nos. insérés au registre, et que la police devra porter ce No. ; que l'assurance est faite pour la somme de £3000 ; que la prime convenue est de £22 10s. et que le montant de cette prime a été alors *reçu*.

Il paraît que M. Murray prit en paiement de la prime d'assurance un billet de M. Hays, payable le 1er mars

suivant, lequel billet fut déposé par la compagnie à la Banque de Montréal, et protesté à son échéance, protêt dont il n'a été, soit dit en passant, donné aucun avis à l'intimée. M. Murray avait-il fait du paiement du billet une condition de la continuation de l'assurance après le 1er mars ? C'est ce qu'il a prétendu et affirmé dans son témoignage devant le jury. En cela il est contredit par MM. McGill, Taylor et Hays. Ce serait une perte de temps que de transcrire ici des extraits de ces divers témoignages. Comme, pour la raison que j'ai donnée plus haut, ce sont ceux des trois derniers témoins qui doivent prévaloir, qu'il suffise de dire qu'il résulte de la preuve que l'assurance n'a pas été conditionnelle ; qu'elle a été faite purement et simplement pour l'espace d'une année ; que M. Murray avait promis de délivrer et d'envoyer le même jour la police d'assurance à l'honorable Peter McGill, entre les mains duquel il savait qu'elle devait être déposée selon le désir de Mme. Reid ; que, cependant, cela n'a pas été fait ; que, dès le même jour de l'assurance, M. Murray a informé MM. McGill et Taylor que cette assurance avait été effectuée, sans, de sa part, faire mention d'aucune condition, ce qui se trouve corroboré par l'entrée dans le registre de la compagnie, puisque nulle condition n'y est énoncée ; qu'en conséquence de cette information, MM. McGill et Taylor qui prenaient un intérêt bien vif dans cette affaire, l'un comme ami, l'autre comme neveu de l'intimée, sont demeurés persuadés, et par suite l'intimée elle-même, et cela de bonne foi, que l'assurance avait été effectuée purement et simplement en la manière ordinaire, de manière à donner à Mme. Reid, pendant une année, toute la protection qu'elle en attendait. M. McGill partit pour l'Angleterre dans le mois de juin suivant, et s'il eût eu raison de penser que l'assurance ne fût pas bonne, "I would not have gone to England," dit-il, "without having informed Mrs. Reid of the fact of the insurance being vitiated." Le jour de l'assurance même, M. Taylor se présente au bureau de la compagnie pour s'enquérir si cette assurance a été effec-

tuée : " Mr. Murray told me it had been effected, and said, tell Mrs. Reid the insurance has been effected, the mortgage is covered. M. Murray said nothing to me about the insurance being conditional on the payment of a note ; if he had, I would have insured it myself as I had the money in my pocket." On ne saurait donc avoir de doute sur la bonne foi avec laquelle Mme. Reid a dû se croire bien et dûment assurée ; et cette bonne foi ne doit pas tourner aujourd'hui à son préjudice.

Si, comme le prétend l'agent de la compagnie, l'assurance eût été conditionnelle, le billet devenait de nulle valeur à son échéance faute de paiement ; et l'assurance tombant par cela même, les appelants n'étaient plus exposés à aucune perte, et par conséquent n'avaient plus d'intérêt dans le billet. Cependant ce billet est endossé par M. Murray individuellement, et la compagnie le fait déposer dans la Banque de Montréal, puis protester. Ce protêt n'a pas seulement l'effet de mettre M. Hays en défaut, mais il a encore celui de conserver le recours de la compagnie contre l'endosseur ; et l'on peut raisonnablement croire que c'était l'intention de la compagnie, en agissant ainsi, de s'assurer et d'exercer ce recours contre lui, par le fait seul que les frais du protêt ont été portés au compte de M. Murray lui-même. Le vaste incendie de 1852, en détruisant l'hôtel de M. Hays, a pu peut-être exercer une grande influence sur le mode d'action de la compagnie à l'égard de son agent, mais cela ne saurait en rien altérer les droits acquis à Mme. Reid.

Un témoignage qui me paraît avoir une grande valeur quant à ce point de la contestation, est celui d'un des employés de la compagnie, le fils même du dit William Murray. Ce témoin dit : " My father, in February 1852, had no private account with the Montreal Bank. The expense of protest is charged to my father's private account. . . . The reason why he charged the price of the protest to his own private account, was that as it was going to be a loss

to the company, *as well as the whole note*, which was taken for premium, he thought it but fair to charge the price of the protest to his own private account. The entry in cash book is on the 27th March."

Puisqu'à raison de l'insolvabilité de M. Hays, non seulement le coût du protêt, mais même le montant du billet allait être une perte pour la Compagnie, il s'ensuit donc qu'on ne regardait pas le défaut de paiement de ce billet comme ayant eu l'effet de le rendre non avenü, et d'annuler par contre coup l'assurance, en paiement de la prime de laquelle le dit billet avait été ainsi accepté. La Compagnie a donc continué, après le protêt, d'être créancière du montant du billet. Et comment aurait-elle pu continuer de l'être, si l'assurance ne subsistait plus ?

Tous les autres moyens d'objection invoqués par les appelants tombent d'eux mêmes en présence de l'admission du contrat d'assurance entre l'intimée et les appelants, et je ne crois pas qu'il soit nécessaire d'en parler ici, si ce n'est de celui tiré du prétendu transport que Mme Reid aurait fait de sa créance. Les appelants disent que depuis ce temps-là, elle est sans intérêt. Cette prétention est repoussée par la contre-lettre de M. Taylor, laquelle contre-lettre est valablement invoquée dans cette instance, et doit avoir toute sa force en faveur de la conservation de l'intérêt de Mme Reid dans la créance assurée. " Les contre-lettres sous seings privés," dit Toullier, t. 8, No. 188, " qui ont un autre objet que celui de dissimuler le prix d'une vente, eussent-elles même pour objet de l'annuler, et de la déclarer simulée et feinte, ont entre les parties contractantes la même force que les contre-lettres notariées. Des présomptions ne suffisent pas pour en détruire l'effet et les anéantir, ainsi que l'a jugé la Cour de Paris, dont l'arrêt fut confirmé par la Cour de Cassation, le 9 avril 1807."

Enfin les appelants ont invoqué la disposition de l'acte provincial de 1842, ch. 22 qui porte " que toutes les polices

d'assurance que ce soit, faites en vertu du présent acte ou de l'ordonnance susdite, qui seront signées par trois directeurs de la dite Corporation, (c'est-à-dire de la susdite compagnie) et contre-signées par le secrétaire et les régisseurs, et revêtues du sceau de la dite corporation, obligeront la dite corporation, quoique non-signées en présence du conseil des syndics, pourvu que ces polices soient faites et signées conformément aux règles et règlements de la corporation." Cette forme, si elle est employée, est un moyen de constater l'existence du contrat ; elle peut par elle-même suffire à cet effet ; mais la disposition du statut qui l'autorise, ne doit pas être, à mon avis, interprétée comme affectant l'essence du contrat, excluant tout autre moyen d'en établir l'existence suivant les règles ordinaires de la preuve des conventions. Au reste, il est constaté, et M. Murray l'admet lui-même, que c'est l'usage de la compagnie des appelants, ainsi que de plusieurs autres compagnies d'assurance dans Montréal, d'effectuer, même verbalement, des assurances et de les regarder comme obligatoires pour un temps plus ou moins long, sans police, et même sans avoir reçu la prime.

CARON, Juge :—Action par l'intimée contre l'assurance de Montréal (appelante) ; pour £3000, montant d'une créance qu'elle avait contre le nommé Hays, par hypothèque sur une propriété nommée *Hays House* ; créance qu'elle prétend avoir assurée à la dite *Assurance*, et qu'elle a droit de réclamer elle, vu que la maison sur laquelle elle était hypothéquée est détruite par le feu.

Outre une défense en droit qui a été renvoyée, la défenderesse a plaidé une défense au fonds en fait, et plusieurs exceptions qui peuvent se resumer :

I.—D'après les règles de l'institution, il ne pouvait y avoir d'assurance effectuée sans l'émanation de *police* ; or il n'y a jamais eu de *police* en faveur de la Dme. Reid ; il n'y a pas eu d'assurance, mais seulement des pourparlers sur



le sujet ; une offre par Hays d'assurer, offre qui fut refusée, la prime n'ayant pas été payée ; l'assurance étant conditionnelle, si la prime était payée, ce qui n'a pas été fait.

II.—Le 28 janvier 1852, vente de la propriété hypothéquée à Hays fils, pour £8,500, sur lesquels il a promis payer la Dme. Reid £3000. Elle a comparu à l'acte, a accepté ; partant il y a eu novation, et partant la situation de cette dame et de Hays son débiteur a été changé.

III.—La Dme. Reid n'avait plus d'intérêt assurable sur la propriété en question, ayant transporté sa créance à Hugh Taylor, par acte du 23 juin 1852.

IV.—Elle n'avait pas d'intérêt assurable parceque les hypothèques préférables et antérieures à la sienne sur le dit immeuble en absorbaient la valeur, tellement que l'intimée ne perdait rien par l'incendie de la propriété.

D'après la défense en fait, c'était à la demanderesse, intimée, à faire preuve du contrat qu'elle alléguait avec l'assurance. Elle n'a pu produire la police, il n'y en a jamais eu, pour y suppléer elle a fait venir, comme témoin, le nommé William Murray, lequel est le premier témoin interrogé de la part de la poursuite devant le juré devant lequel ce procès a eu lieu, lequel a été présidé par M. le juge Smith.

Ce témoin a prouvé l'entrée faite au livre de la compagnie, constatant qu'une assurance au montant de £3000 avait été effectuée en faveur de Mde. Reid, à la demande de Hays, dont le billet promissoire avait été pris et accepté par Murray pour la prime, £22 10s.

Mais Murray dit que cette entrée était conditionnelle, et était pour constater une assurance conditionnelle, savoir, que l'assurance ne devait subsister que jusqu'à l'échéance du billet ; que si à cette époque il était payé, alors l'assurance continuait pour l'année, l'assurance devant être nulle si le billet n'était pas payé ; que de fait le billet n'a pas été

payé à son échéance ; qu'il a été protesté ; que Hays a été informé que l'assurance était *cancellée* ; que de fait elle l'a été avant le feu, et que, partant, à l'époque où il a eu lieu il n'y avait pas d'assurance en faveur de Mde. Reid.

Hays qui a fait *l'application* pour assurance nie positivement la condition en question, il dit au contraire que Murray a pris son billet pour et au lieu de la prime, l'a informé que la créance de Mde. Reid était assurée, et n'a fait aucune mention de la condition dont il parle dans son témoignage.

L'assurance était définitive et complétée, si bien qu'il a été entendu que la *police* serait envoyée à M. McGill, l'ami de Mde. Reid, que lui, Hays, en a de suite informé M. McGill qui a promis aller prendre la police.

McGill et Taylor, entendus comme témoins, prouvent que Murray leur a dit à tous deux, en différents temps, que l'assurance était effectuée, que le billet de Hays avait été accepté pour la prime, et qu'il n'a été fait aucune mention de la condition, si ce n'est après le feu.

En un mot ces trois témoins contredisent le témoignage de Murray complètement, et établissent, par ses propres aveux, que l'assurance était complète.

Ainsi si ces témoignages sont légalement pris, et qu'on les préfère à celui de Murray, il faut tenir que le contrat d'assurance allégué par l'intimée est prouvé légalement et suffisamment.

Sous le rapport de la respectabilité, chacun des témoins : Hays, McGill et Taylor, valent, à tous égards, celui de Murray.

La preuve testimoniale était admissible, d'abord c'est affaire de commerce, et en outre il y avait preuve écrite du contrat.

Hays est admissible ; son intérêt étant *balancé*, il doit la somme. Si l'assurance paye, de droit elle est subrogée, et Hays ne fait que changer de créancier.

Quant à Taylor, il est également sans intérêt, le transport qui lui a été fait n'étant pas sérieux, ainsi qu'il le dit lui même, et ainsi que le montre la contre-lettre prouvée dans la cause.

Quant à M. McGill, pas un mot n'a été dit contre son témoignage, qui cependant est en contradiction manifeste avec celui de Murray.

Les aveux de Murray, l'agent, l'âme de l'assurance, lient sûrement cette Corporation ; or ces aveux établissent le contrat.

Du reste, dans le cas actuel, Murray n'a fait que ce que lui et les autres représentants d'assurances, étaient journellement dans l'habitude de faire—prendre des risques verbalement, et quelquefois sans avoir été préalablement payé de la prime.

Sur la question de fait, je n'ai pas de doute, le contrat est prouvé.

Sur la question de droit je suis d'avis :

1o. Que le contrat d'assurance peut être valable sans être par écrit ; l'écrit n'est requis que pour la preuve, et il a été dit déjà que, dans le cas actuel, il y avait écrit, et que c'était affaire de commerce qui aurait pu se prouver sans écrit.

2o. Que la novation alléguée n'existe pas, quant à la propriété assurée, la quelle était affectée au paiement de la créance de l'intimée, et sur le produit de laquelle elle comptait entièrement pour son paiement. C'est cette sûreté sur l'immeuble ou plutôt l'hypothèque qu'elle avait sur cet immeuble qu'elle assurait ; ainsi que le débiteur fût le père ou le fils, ce changement n'influerait en rien sur la nature du contrat fait avec l'assureur. Il n'y a pas eu de novation, l'immeuble est resté après la date comme avant sujet à l'hypothèque de l'intimé, qui était la chose assurée.

30. Lors de l'assurance et lors de l'incendie, l'intimée avait un intérêt *assurable*, puisque le transport à Taylor, du 23 juin 1852, n'était que *pro formâ*, ainsi que le prouve Taylor lui-même, et encore mieux la contre-lettre du 24 juin 1852.

La charge du juge me paraît conforme aux faits prouvés, et ses décisions, quant aux questions de témoignage et de droit, me semblent en tout correctes.

L'approuve également les décisions de la Cour inférieure, qui a renvoyé la défense en droit, celle qui a mis de côté le 6e moyen des défenses, aussi bien que l'ordre réglant l'articulation de faits, qui me paraît suffisante et propre à couvrir tous les points de la cause sur lesquels les jurés avaient à se prononcer.

Les considérations d'équité et d'honnêteté sont tout à fait en faveur de l'intimée ; si l'assurance était conditionnelle, Mde. Reid aurait dû en être informée.

Si le billet eut été pris conditionnellement, comme c'était l'intérêt de Mde. Reid qui était assuré, elle aurait dû être avertie. La prétention que Murray a outre passé ses pouvoirs, est absurde, peu digne d'une institution *publique*. En fait et en droit le jugement de la Cour inférieure est correct et devrait être confirmé.

CROSS AND BANCROFT, for appellants.

A. ROBERTSON, counsel.

ABBOTT, for respondent.

ROSE, Q. C., counsel.

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Respondent's Authorities :—

As to hypothetical plea :

Macfarlane v. Scriver, Sup. Court, Montreal, 22d April, 1850 :—Griffith v. Eyles, 1 Bos. and Pull. 413 :—Cook v. Cox, 3 M. and S. 114 :—Rex. v. Morley, 1 You. and Jer. 221.

As to parol evidence of contract generally :

3 Boulay Paty, 246 :—2 Vallin, 20 :—Pothier, Ass., Nos. 96, 97 :—Boudouaqué, pp. 243 et seq. to 250 :—3 Pardessus, No. 792 :—Perril, p. 59, No. 46 :—1 Alauzet, 339 :—2 Pardessus, 563 :—1 Alauzet, 181 :—Queensault, 97, 104 to 107. English rule as to policy was only fiscal, 25 Geo. III. c. 44 :—28 Geo. III. cap. 56 :—1 Phill., Ev., 8 :—Harding v. Carter, 1 Park, 4 :—Hamilton v. Lycoming Ins. Co., 5 Burr. 339 :—Angel on Ins. §§ 19, 68, 69, 71, cap. 1, § 19, cap. 3, §§ 31 to 38 :—1 Duer, 60, 61, 100, 101, 110 :—Thayer v. Middlesex Ins. Co., 10 Picken, 325 :—Ellis, p. 36, note.

**SMITH, Justice :—**(1) The action is brought by Mrs. Reid, as Universal Fiduciary Legatee of the late Chief Justice Reid, to recover the amount of £3,000 on a contract of Insurance against Fire, alleged in her declaration to have been verbally entered in her behalf by Moses Judah Hays, in February, 1852, with the defendants, under a completed agreement for insurance.

The defence rests on general grounds :

1. That there was no such contract made, but simply a proposition by Mr. Hays, not completed.

2. That Mr. Hays had ceased to have any insurable interest in the property itself, having sold the property previously by deed to M. V. Hays, to which the plaintiff was a party.

3. That the plaintiff had no insurable interest, having sold and transferred her mortgage previously to the loss.

4. That the property was mortgaged by anterior mortgages to more than its value.

The plaintiff alleges a completed Assurance, the defendant says it was a proposal, or at most a conditional Insurance. They insisted on the trial, that a writing was necessary to the completion and proof of the contract. This has been overruled. No authority in law was cited to shew that a verbal contract of Insurance cannot take effect, nor to establish the ground taken by the defendants, that such a contract must be in writing. Authorities from the French

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As to exclusion of it by appellant's charter and by-laws :

6 Vic. cap. 22, § 4. Only directory :—Angel and Ames, p. 248, Nos. 253, 229, 237, 292 :—Story on Agency, p. 58, No. 53 :—Safford v. Wyckoff, 4 Hill, 446 :—2 Pardessus, 565, No. 593 :—Marshall, 303 :—Boudouquis, 108, 109.

As to award of interest :

2 Phillips on Ins., 750 :—3 Car. and P., 496.

As to insurable interest :

Ellis, p. 26, English ed., pp. 63, 64, 69, 70, Amer. ed.

As to note for premium :

2 Alauzet, 328, 329, 332 :—Angell on Ins., p. 95.

As to admissibility of evidence as to declarations of agent :

1 Greenleaf, Ev., 113 :—Story, Agency, Nos. 134 et seq. :—8 Bingh. 453.

(1) The following is the charge of the presiding judge to the jury upon the trial of the case in the Court below.

Law have been cited, but these are not applicable ; the contract is a Commercial Contract and is governed by the English Law. I see nothing in the English Law to shew that the contract cannot be made and proved without a writing, and I hold that it can be proved without any writing. This is not matter of consideration for you, and the ruling of the Court on this head must be taken as the law of the case, and the defendants must be left to their recourse in case that ruling is incorrect.

You have then the evidence of four witnesses on the contract as alleged. 1st. That of Mr. Murray, the agent and manager of defendants. 2nd. The evidence of Mr. Hays. 3rd. Of Mr. McGill, and 4th. of Mr. Taylor. Before going into the evidence of these witnesses, I would refer to the book produced by Mr. Murray, called the register or Order Book for Assurances. Here you have a complete contract of Insurance entered in this book. (Reads entry in the book and the headings.) This, uncontradicted and unexplained, will undoubtedly prove a contract. Whatever may be said as to the change of contract, the book shows a contract in the usual form. It is impossible to read the entry without seeing that there was more than a proposal. No receipt was given,—no policy issued. What then was the true nature of the contract. Mr. Murray states that there never was an absolute contract made ; that it was merely a proposal never carried out, but that it was conditioned on the payment of the note given for the premium, and that if that note was paid, a policy would issue ; that without payment, no policy was to issue, and that Mr. Hays was so informed, and agreed to the condition. This admission leaves no doubt that a contract was made, but leaves it doubtful whether it was a conditional or a completed contract. This is the true question. An objection was made to the proof of admissions made by Murray to McGill and others, as not binding on the defendants, unless these admissions had been made at the time of the contract. The principle is correct to the extent that, if the contract was

really made, the casual admission of the agent, subsequently made, should not be permitted to destroy the contract. But the principle does not apply in this case. Mr. Murray's admissions were made before the completion of the contract, and Mr. Murray's admissions must bind the defendants. I look upon Mr. McGill's evidence, therefore, as good evidence to go to the jury. He was not the agent of the plaintiff to effect the insurance, nor was Mr. Taylor. They were friends of the plaintiff, having sufficient interest and authority to make the inquiries they did. Hays states that the contract was completed, that a policy was to issue; that he told Mr. McGill so at the time, and asked him to go over and get the policy. Mr. McGill proves that he went the same day to the defendants' office, and that M. Murray then stated that the policy was to issue. Mr. Murray in his evidence states the reverse, that it was to issue only on payment of the note. One or the other of these statements must be incorrect; they cannot co-exist, but are wholly irreconcilable. Mr. Taylor's evidence was objected to on the ground of interest generally, and also by reason of the assignments made to him, which were read to you. No doubt, if the plaintiff had transferred her interest before the loss, she had no insurable interest. The contract of insurance is a contract of indemnity, and if there is no interest there is no loss. But there is the declaration of Mr. Taylor, that the assignments were without consideration, and made merely *pro forma*, without any money passing, and merely from considerations which are referred to in his written declaration made at the time of the assignment, that the money assigned never vested in him, that he was a mere nominal transferee without interest. The objections to his testimony were overruled. The declaration or *contre-lettre* must be taken as evidence. The defendants' have no interest to contradict or impeach this declaration, except for the purpose of shewing that the plaintiff had no insurable interest, or that it was made in fraud of defendants' rights. But the declaration or *contre-lettre*, as between Mr. Taylor

and the plaintiff, was good ; they had the right to make such a declaration, and the objection that Taylor could not destroy the contract of assignment himself, or by evidence or declaration of a nature inferior to the assignments, is not founded. The declaration is therefore good evidence and must be taken as such. It is proved that no value passed between the parties, but that the transfer was merely *pro forma*. There is no evidence of fraud, and the declaration and statements of Mr. Taylor must be allowed to explain the assignments.

Admitting, therefore, Taylor's evidence, you are to look at it. He states that he called on Mr. McGill, and inquired of him whether the insurance was effected. Mr. McGill stated what Hays had told him, that it was completed ; but said to Taylor he had better go over to the defendants' office and see whether this was actually the case. Taylor goes over, sees Mr. Murray, and states what took place there ; that Mr. Murray said nothing of Hays' note, but admitted that the insurance was effected, and Mrs. Reid's interests secured, and the mortgage safe. I have nothing to say as to the contradictions between Mr. Murray's statements and Mr. Taylor's. It is for you to consider them. But, if the contract was a conditional contract as stated by Mr. Murray, then it contradicts the entry in the book. Can the defendants shake the evidence of the entry by Mr. Murray's statements ? I think not. Certainly such statements alone would not be sufficient to explain the entries. Look at the headings. What can they mean if the contract was only conditional ? There the amount of premium is entered under the heading of amounts paid. This is a strong circumstance, to which I attach considerable importance. If you find the manager stating anything in contradiction to it, you will consider what such contradiction may amount to, and you will be led to the true appreciation of what Mr. Murray's evidence on that head is worth.

Besides, if the contract was conditional, why was it not



entered as such in the book? Unless we say this was merely a temporary entry, it must be conclusive. Now, we have only Mr. Murray's evidence on that point. He says it was an entry for a policy, and that the description was entered, and the terms of insurance agreed on, and that a policy was to be issued conditionally on the payment of the note,—that it was merely a proposition and not a completed contract. But there is nothing of all this in the entry.

The other evidence given in the cause is of little value, if you are satisfied on one side or the other as to the contract.

There is but one real issue, that is, was the contract a contract conditional or not? Was the note to be paid before the policy issued, or was the contract completed at the time? This is the sole question as to the contract. The practice of other offices is of little consequence. They are shewn to be different, each office having its own way of conducting its business. The entry in the defendants' book is what you have to look to. This the manager cannot destroy. It must be presumed to bind the company, to have been made under the eye of the directors, to have been before them at every one of their meetings. The entry for the premium is made as *cash*, and appears in the column of cash paid for *premiums on policies*. Mr. Murray's evidence cannot shake it. If he gave credit, it was at his own risk, if he gave credit to Hays, this credit cannot invalidate the contract, it could not affect the plaintiff's interest in the insurance.

There are one or two other points on which I have a few words to say. If you take the contract as a conditional one, but as made with the plaintiff, the condition being the payment of the premium before a policy should issue, then I think it was the duty of the defendants to have given the plaintiff notice of the non-payment of the note. No rule of law is clearer, that in all commercial contracts, and espe-

cially where notes or cheques pass, the holder is bound to strict diligence. If the defendants took Hays' note in payment of the premium as the consideration of the contract with Mrs. Reid, then as no notice was given to Mrs. Reid, there is *laches* on the part of the defendants. Commercial laws are based on reason, upon common sense as the result of practical experience thoroughly sifted through the crucible of the greatest minds of all times and of all nations. The commercial law did not create commercial usage, but commercial usage created the law. Without, therefore, any authority precisely applicable to this case, as binding the defendants to give notice to the plaintiff, what more reasonable than to hold them to this diligence? It was their duty to see the note was collected, and as the note was the consideration of the contract with the plaintiff, she should have had notice that it was not paid. In that case she could have paid the premium, and her rights could have been protected. The opportunity to do this was not given, and this by the *laches* of the defendants. Even if the contract was a conditional one, I think the defendants wrong in this particular, because the contract might have been completed by payment of the premium, and that we have no such evidence of a merely conditional contract as to dispense with this notice to her.

Again, why was not the note returned? It was produced by Mr. Murray, and has been kept by him. Why was this? It is a circumstance which you are to consider and appreciate. In my mind it has considerable weight. Murray says, he retained the note for the costs of its protest and for the premium due for the period for which, in his evidence, the contract of insurance was binding, that is, during the period of the running of the note. This rather, in my opinion, proves the necessity of notice being given to Mrs. Reid.

The point raised as to the sale by Moses Judah Hays in January, previous to the insurance, is of no importance in

this case. The contract is as to the interest of a mortgagee on a block of buildings described in the policy as the Hays House, and not alleged as being the property of Moses Judah Hays, and it is a matter of no moment whether the buildings belonged to the father or the son.

As to the point of the property being mortgaged above its value, giving the defendants the benefit of the principle invoked by them, there is no proof that can avail them. Hays swears the property was of the value of £24,000. There is no evidence to contradict this. The record produced by the prothonotary in the case of the application of Myer V. Hays for ratification of title, shews there were oppositions filed for mortgage claims. This is not such evidence as you can consider. The mortgage rights which the defendants were bound to have proved, are mortgage rights clear, uncontested, and enregistered, and not litigated rights and claims of mortgage. That part of the defence, therefore, falls to the ground.

I have drawn your attention to the main features of the evidence, it is your duty to weigh the facts. It is not for me to say which of the disputed statements you are to believe. You are, as capable of deciding on these as I am. I can only say that the different statements made by M. Murray, on the one hand, and by M. Hays, M. McGill, and M. Taylor, on the other, are not merely contradictory but totally irreconcilable. If you believe the *one* witness you must disbelieve the *three*. There cannot be a contract conditional on the payment of the note, and a completed one. You are to determine which statements are to be believed. The nature of the testimony makes the case important and worthy of your consideration. Some years have elapsed since the transactions took place, and this might account for minor discrepancies, but not for the contradictory statements referred to. The character of the witnesses, who are all respectable, makes your duty in this respect more difficult. But if doubts remain and you find it diffi-

cult to come to a decision, you may discard both sets of statements and fall back upon the book as containing the contract itself, evidence which cannot deceive, and which binds the defendants.

The recent change in the law renders it necessary that you should give specific answers to certain questions adopted by the Court, as the points raised by the pleadings in this cause.

On these questions you will have to decide, and your answers will be written down.

Before leaving the case in your hands, however, I wish to allude to a point raised in order that the defendants' counsel may have the benefit of a decision on it. The point was, that there could be no assurance in this case without a policy, and that if made, such policy should be made in the form set forth in the statute incorporating the company.

I am against them on this point. The statute, as I read it, does not positively and absolutely prescribe the form of the contract, but enacts that all policies made in the form mentioned, signed and sealed, as mentioned in the statute, and in conformity with the by-laws of the company shall be binding on the company. But the statute does not say that no policies otherwise executed shall be void, and the company may make other stipulations if they see fit, which may be perfectly binding as a good contract before the policy issues. It was contended also, that if in this case a contract of assurance was made, it was made subject to the usual conditions of the defendants' policies, as proved in the form produced by defendants. On this point also I am against the defendants. The conditions cannot enter into the contract as made in this cause, there being no mention of any such conditions, as no policy was issued, with these remarks I leave the case in your hands."

BANC DE LA REINE, } DISTRICT DE MONTRÉAL.  
 EN APPEL.

Présents :—Sir L. H. LaFontaine, Baronnet, Juge-en-Chef,  
 AYLWIN, DUVAL et CARON, Juges.

GORE, *et al*, ..... *Appelants.*  
 et

GUGY, ..... *Intimé.*

Jugé :—Que sur jugement déclarant  
 une instance périmée, le tribunal peut ac-  
 corder les frais encourus par la partie de-  
 fendereuse en la demande ainsi périmée.

Held :—That in a judgment declaring a  
 suit lapsed, *périmée*, the Court may con-  
 demn the plaintiff to pay the costs incur-  
 red by the party obtaining such judgment.

Jugement rendu le 3 septembre, 1858.

Sir L. H. LaFontaine, Bart., Juge-en-Chef.—Les ap-  
 pelants ayant laissé écouler plus de trois années sans faire  
 aucun procédé, la Cour Supérieure, à Montréal, sur mo-  
 tion de l'intimé, déclara l'instance périmée, et débouta les  
 premiers de leur action *avec dépens*. Les appelants ont ap-  
 pelé de cette condamnation avec dépens, soutenant que,  
 lorsqu'il y a péremption d'instance, chaque partie doit por-  
 ter les frais qu'elle a faits.

La seule question est donc celle de savoir si la partie  
 contre laquelle la péremption d'instance est prononcée, peut  
 être condamnée aux dépens. Il paraît que, sur cette ques-  
 tion, nos tribunaux de première instance n'ont pas toujours  
 été d'accord.

Le principal texte de loi à consulter sur cette matière est  
 celui de l'ordonnance de Roussillon, (1563) art 15, lequel  
 est ainsi conçu : “ L'instance intentée, ores qu'elle soit  
 contestée, si par le laps de trois ans elle est discontinuée,  
 n'aura aucun effet de perpétuer ou proroger l'action, ains  
 aura la prescription son cours, comme si la dite instance  
 n'avait pas été formée ni introduite, et sans qu'on puisse  
 prétendre prescription avoir été interrompue.”

L'article 1er du titre 31 de l'ordonnance de 1667, porte :

“ Toute partie, soit principale ou intervenante, *qui succombera*, même avec renvois, déclinatoires, evocations ou réglemens de juges, sera condamnée aux dépens indéfiniment etc., etc.” Il est vrai que cet article de l’ordonnance a été modifié par le procès-verbal qui a accompagné son enregistrement au Canada en 1679, mais cette modification conserve toujours aux juges la faculté de condamner aux dépens.

Nous lisons dans la 4e édition, donnée en 1609 par Gueinois, de “ la Practique judiciaire tant civile que criminelle,” par Jean Imbert ; chap. 33, p. 226 : “... Et quant aux autres actions, si la poursuite en a été intermise et discontinuée par trois ans, auparavant, ou après contestation en cause, l’instance est périe, et n’est on plus tenu de procéder en icelle. Toutefois par-cy-devant le prince avait accoustumé relever de la dite péremption d’instance, sinon qu’auparavant la partie défenderesse eust obtenu lettres Royaux, tendans à fin de faire declarer la dite instance périe ; car lors l’on n’estait plus relevé de la dite péremption, *mais estait le demandeur condamné ès despens de l’instance déclarée périe, et de l’instance faite sur la dite péremption*, sauf au dit demandeur de se pourvoir par autres voies que de raison, qui estait qu’il pouvait de nouveau intenter son action.” Puis à l’annotation sur ce chapitre 33, on lit : *Baldus d. l. properandum § illo*. Car encores que l’instance soit périe, le juge de son office peut condamner *aux dépens*. Felin, in cap. *venerabilis exter. de judic.* rapporte la forme que Matianus veut être gardée... *Dec consil. 34, in primâ parte consil. Qui enim litem inchoavit nec persecutus est tenetur ad expensas in lite peremptâ factas*.

Grimaudet (édition de 1699, p. 213, liv. 10, chap. 10), “ bien qu’il soit d’opinion qu’il ne doit pas y avoir de condamnation aux dépens en péremption d’instance, remarque néanmoins que Bartole, Alexandre, Jason et autres docteurs sont d’avis que, combien que l’instance soit finie, si elle est prolongée outre le temps contenu en la loi, toute-

fois l'office du juge dure encore pour déclarer l'instance périe, et absoudre le défendeur, et condamner le demandeur vers lui ès dépens de l'instance."

Au chapitre 4 du même livre, pp. 202-3, l'auteur avait déjà cité un arrêt rendu entre Duchesne et la veuve D'ambigné, le 25 juin 1571, par lequel "la Cour a mis et met l'appellation, et ce dont est appelé au néant, sans amende et sans dépens de la cause d'appel *et pour cause*. Et en émendant et corrigeant le jugement déclare l'instance intentée par les intimés périe, demeurant néanmoins l'action principale en son entier, et réserve aux mineurs leur recours pour leurs dommages et intérêts et fruits à l'encontre de leurs tuteurs, et à eux leurs défenses au contraire." Le passage cité n'indique pas si la péremption fut accordée avec ou sans dépens. Les mots "sans amende et sans dépens de la cause d'appel," étant expressément restreints à l'appel même, sont bien propres à nous porter à croire que cette exemption de payer les dépens ne devait pas s'étendre à ceux de la cause en première instance. Mais même en supposant qu'elle dût comprendre ces derniers dépens, que résulte-t-il du dispositif de l'arrêt? C'est que le tribunal, appréciant les circonstances particulières du procès où l'on voit que des enfants mineurs étaient engagés, crut qu'il y avait lieu, en cette instance, d'exercer, quant aux dépens, ce pouvoir discrétionnaire que les tribunaux français étaient dans l'habitude d'exercer si souvent, même après l'ordonnance de 1667. Que, par l'arrêt en question, une telle discrétion eût été exercée, les mots significatifs "*et pour cause*" qui s'y trouvent, l'attestent clairement et ne permettent pas d'entretenir le moindre doute. Si donc il n'y a là que l'exercice d'un pouvoir discrétionnaire, le même pouvoir aurait pu aussi bien faire prononcer une condamnation qu'une absolution. Donc, à l'époque où écrivait Grimaudet, les tribunaux pouvaient, contre le sentiment de l'auteur il est vrai, accorder les dépens sur une péremption d'instance, ou ne les pas accorder.

L'ordonnance de Roussillon ne s'observait pas dans tous les parlements de France. Les annotateurs de Duplessis sur la coutume de Paris, 3e. édition 1709, p. 510, remarquent que cette ordonnance s'observait dans les parlements de Paris, Normandie, Provence et Bretagne, mais qu'elle n'avait pas lieu aux parlements de Toulouse et de Grenoble." (1)

Nous trouvons dans Brodeau sur Louet, tome 2, éd. de 1742, d'abord à la page 344, un arrêt, en un procès évoqué du parlement de Bretagne, du dernier août 1652, qui déclare l'instance d'une requête civile *périe*, et *condamne le défendeur aux dépens* ; puis à la page 345, un autre arrêt du 9 août 1630, qui déclare l'instance *périe* et *condamne l'intimé aux dépens de l'instance de péremption*. Il est vrai qu'aussitôt après, à la même page, on voit un autre arrêt du 20 août 1633, qui déclare une instance pendante aux requêtes du palais pour raison de droits honorifiques de l'église de St. Denis de Moulissant, *périe*, mais *sans dépens*. Ce qui, tout en nous donnant un nouvel exemple de l'exercice d'un pouvoir discrétionnaire, n'en atteste pas moins que ces arrêts sont loin d'étayer la doctrine que soutiennent les appelants en la présente cause. De même, nous voyons encore cette discrétion exercée en faveur de la partie qui succombe, dans deux arrêts du parlement de Dijon, l'un du 19 février 1680, et l'autre du 2 janvier 1727, rapportés par Périer, édit. de 1735, tome 2, pp. 766 à 771. Le premier, dans un procès mû entre les deux frères Sigault, l'un étant ensuite représenté par ses héritiers, a jugé qu'une appellation, sur péremption d'instance, serait mise au néant, et les parties hors de Cour ; et le second déclare l'appellation périmée *dépens compensés*.

Dans le tome 5e du Journal des audiences du parlement de Paris, publié en 1755, à la page 378-9, 1ère partie, on

(1) Le "Recueil des anciennes lois françaises," par Isambert et autres, tome 14, partie 1ère, p. 160, nous apprend que l'ord. avait été enregistrée au parlement de Dijon, le 30 mars 1563, à celui de Bretagne le 8 mai 1564, et au parlement de Paris le 22 décembre de la même année.



voit un arrêt du 5 juin 1703, entre Antoine Boudet, demandeur en péremption d'instance, et Thérèse Mossct, défenderesse, qui déclare l'appel interjeté par cette dernière péri, et la *condamne en l'amende de 12 livres et aux dépens*, puis à la page 124, de la seconde partie, un autre arrêt du 27 février 1708, entre de Sérézy, appelant, et la veuve Bezard, intimée, qui déclare l'appel *péri*, et *condamne* le dit Sérézy en l'amende de 12 livres et aux dépens de l'instance.

Journal des Audiences et arrêts du Parlement de Bretagne, tome 1, p. 309, chap. 64, arrêt du 15 juillet 1724, qui déclare une appellation périmée et *condamne l'appelant en l'amende de 75 livres au roi et aux dépens* ; pp. 490 à 492, chap. 103, arrêt du 23 juillet 1732, sur péremption d'instance, et la femme Pellet, contre laquelle elle était demandée, est condamnée aux dépens ; tome 5, p. 204, chap. 35, *condamnation aux dépens* prononcée contre la partie qui avait laissé périmer son instance.

Nous avons un " Traité des Péremptions des instances " par Jean Menelet, quelquefois appelé Melenet. J'en connais deux éditions, l'une de 1750, revue et augmentée par Bridon, et l'autre de 1787, augmentée d'un traité de feu M. le président Bouhier, sur la même matière. (1).

Dans l'édition revue par Bridon, p. 140, Menelet s'exprime ainsi sur la question, savoir si la partie qui oppose la péremption, doit avoir les dépens par elle faits dans l'instance périmée : " Il faut croire en ce cas que toute l'instance étant anéantie respectivement, on ne se peut rien demander de part ni d'autre des frais faits dans un procès périmé." Il cite Vervin, Fileau, Chenu, Le Prestre, les arrêts de Lamoignon, Henrys et Auzanet. Mais aussitôt son annotateur lui oppose un arrêt du 4 avril 1732, rendu par le parlement de Dijon, au profit de Benoit Mugnier

(1) Dans cette édition, l'auteur est appelé Melenet, lui et Bridon avaient été avocats au parlement de Dijon, et Bouhier avait été président à Mortier de ce parlement.

contre Philippe et Jean Duchesne. Il a été jugé par cet arrêt, dit-il, " que le demandeur en péremption est en droit de répéter non seulement les dépens de l'instance intentée pour faire décider la péremption, mais encore ceux de l'instance principale déclarée périmée ; tous ces frais sont adjugés par l'arrêt." Les moyens respectivement employés par les avocats des parties sont imprimés, page 160.

Dans le " titre de la péremption d'instance " par Bouhier, ajouté à la deuxième édition de Menelet, on trouve les arrêts suivants : pp. 118 et 119, entre Rondat et Bijon ; sur la demande du premier, par arrêt du 10 juin 1723, l'instance de désertion et l'appellation furent déclarées périmées et Bijon condamné " en tous les dépens faits à la Cour et en ceux de l'amende."

Page 121, arrêt contradictoire du 11 décembre 1724, entre Derepas et Barbier, appelants, et Chintré et Fricaud, intimés, qui déclara l'instance périmée, *et condamna l'appelant aux dépens.*— P. 146, arrêt du 1er. février 1738, entre le marquis de Rougement, appelant, et le prieur de Belmont, sur un procès pour dîme, qui, sur la demande en péremption de l'instance d'appel, met les parties " hors de Cour et de procès, dépens compensés."

Puis, aux " Additions au titre de la péremption d'instance" dans le même ouvrage, on trouve pages 172 à 175, un arrêt du 27 mars 1759, " conforme aux conclusions des intimés, demandeurs en péremption." Ces conclusions, p. 175, étaient " que la dite appellation fût déclarée périmée, faute de poursuites pendant plus de trois années ; en conséquence que ce dont était appel sortirait effet, et l'appelant condamné en l'amende modérée de 12 livres, aux dépens de la cause et de l'instance de péremption ;" puis à la page 177, un autre arrêt contradictoire du 17 mars 1779, " par lequel, sans s'arrêter à l'opposition formée par M. Maleteste à l'arrêt du 1er. mars précédent, non plus qu'à ses conclusions, l'appellation a été déclarée périmée, il a

été ordonné que la sentence sortirait son plein et entier effet ; M. Maleteste *condamné aux dépens de la cause d'appel, de l'instance de péremption et en ceux de l'incident.*"

Les arrêts que j'ai cités, comme constatant le pouvoir souvent exercé par les tribunaux de France, de condamner aux dépens en matière de péremption d'instance, me semblent justifier le jugement dont est appel. Ils viennent jusqu'à l'année 1779, et le principe qui leur sert de base a été reconnu même avant l'ordonnance de Roussillon, puisqu'on le trouve consacré dans " Le Conseil de Pierre Desfontaines," l'un de nos plus anciens livres de droit. Il est vrai que l'on peut citer plusieurs arrêts, et j'en ai cités moi-même, qui, en pareils cas, n'ont pas accordé les dépens. Mais cela ne fait qu'attester que les juges pouvaient, à leur discrétion, les accorder, ou ne pas les accorder. Donc le pouvoir des tribunaux de condamner aux dépens la partie qui succombait sur une demande en péremption d'instance, était un pouvoir qui n'était pas contesté, ou du moins qui a été constamment admis par la jurisprudence des arrêts, nonobstant le sentiment de quelques auteurs qui lui était contraire.

Cette jurisprudence a été d'autant mieux *reconnue* qu'on la voit consacré non seulement par les auteurs qui ont écrit en France sur la procédure vers la fin de l'existence de l'ancien droit, tels que Pigeau et Ravaut, mais encore par des Lettres Patentes du Roi données à Marly le 23 mai 1778, enregistrées au Parlement, le 1er. juin suivant, tel que nous l'apprend Ravaut, dans son traité de la Procédure Civile, édition de 1778, pages 338 et 339, dans lesquelles Lettres-Patentes il est dit : " Voulons que les droits portés aux dits tarifs soient alloués et passés en taxe aux parties, sans aucune difficulté, dans les exécutoires de dépens qui en pourront être délivrés, etc." Ces Lettres-Patentes établissaient un nouveau tarif des frais et droits à percevoir par les procureurs du parlement de Paris ; et l'un des articles de ce tarif accordait des frais et honoraires sur

“ demande en péremption d'instance ; ” page 346. Puis, le même auteur, Ravaut, à la page 537, nous donne la formule d'une “ requête pour demander la péremption ” sur un appel. Les conclusions sont : “ qu'il vous plaise.... déclarer le dit appel *péri*, suivant l'ordonnance ; en conséquence mettre l'appellation au néant, ordonner que la sentence dont est appel sortira son plein et entier effet, *condamner le dit B., en l'amende ordinaire de 12 livres, et en tous les dépens des causes d'appel, et demande, même en ceux de la demande en péremption.* ”

Semblable formule de requête en péremption d'instance se trouve dans Pigeau, édit. de 1779, tome 1, p. 356, dans laquelle formule on conclut à ce que le Sr. Paul soit assigné à comparaître “ pour voir dire, qu'attendu la cessation des procédures depuis plus de trois années etc., etc.... la dite demande, ensemble l'instance introduite par icelle, seront déclarées et demeureront péries ; en conséquence, que le dit sieur Paul sera *condamné aux dépens* de la dite instance ; et pour en outre répondre et procéder, comme de raison à fin de dépens sur la présente demande etc. “ Puis, ” ajoute Pigeau, p. 359, “ si la péremption est admise, le jugement est ainsi :

“ Nous déclarons la demande formée par la partie d'A. afin de paiement de la somme de.... et l'instance introduite par icelle, *péries* ; en conséquence *la condamnons aux dépens, tant de la dite instance que de ceux faits sur la demande en péremption.* ”

Les lettres patentes ci-dessus citées de 1778, n'introduisaient pas un nouveau droit ; elles ne faisaient, à l'occasion d'un nouveau tarif, que sanctionner ce qu'une longue jurisprudence d'arrêts avait établi. Et cette jurisprudence a été de nouveau consacrée par l'art. 401 du nouveau code de procédure français, lequel article porte, entre autres choses : “ En cas de péremption, le demandeur principal est *condamné à tous les frais de la procédure périmée.* ” Il est vrai qu'à ce sujet on lit dans *Chauveau sur Carré* :

“ *Les lois de la procédure civile.*” 3 édit., tome 3, p. 442. que cet article du Code de procédure a établi en France un droit *nouveau*, “ puisqu’autre fois lorsque l’instance était périmée, chaque partie payait ses frais,” y est-il dit. L’on sait que les nouveaux codes français ayant emprunté largement aux œuvres de Pothier, les commentateurs sont dans l’habitude de les citer, pour établir ce qui se pratiquait dans la procédure de l’ancien droit. Pothier, dans son traité de la procédure, publié après sa mort en 1778 (1) a dit en effet, (Edit. in 4o. p. 87), lorsqu’une instance est périmée, chaque partie porte les frais qu’elle a faits en cette instance.” Avant Pothier, Lamoignon avait écrit dans ses arrêtés, tome 1er. p. 176, tit. 30, art. 12 : “ Les dépens des procédures faites es instances péries, ne sont adjugées de part ni d’autre.” (2) L’on sait que ces arrêtés n’étaient que des plans de réforme judiciaire, qui étaient restés à l’état de projet, et qui n’ont été livrés à la publicité que longtemps après sa mort, ayant été imprimés pour la première fois en 1702, seulement. Cependant ils étaient déjà connus, puisqu’on les citait au Barreau en manuscrit. (Profession d’avocat, 5e. édition, par Dupin, tome 2, p. 312, No. 1431.) A la tête de l’édition des *arrêtés*, est une lettre datée de Paris, le premier décembre 1699, et signée “ Auzanet, âgé de 79 ans” (3). Au second tome de ces arrêtés, p. 215, Lamoignon s’exprime dans ces termes : “ Les dépens des instances et procédures qui sont déclarées péries, ne doivent-être adjugés de part ni d’autre.” C’est précisément les mêmes termes que l’on retrouve dans les œuvres d’Auzanet, édition de 1708, 2e. partie, p. 68. Auzanet, mort en 1673, les avait donc copiés du manuscrit de Lamoignon. L’appelant nous a cité l’opinion de Lange. Cet auteur était contemporain de Lamoignon, étant né en 1610, et mort en 1684 (4). Or, comment s’exprime Lange,

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(1) Pothier, né le 9 janvier 1699, est mort le 2 mars 1772, Biog. Universelle, t. 35.

(2) Lamoignon, né en 1617, est mort le 10 décembre 1677, Biog. Univ : t. 23.

(3) Il est mort le 17 avril 1673.

(4) Biographie Universelle t. 23.

tome 1er. p. 520, 15e. édition ? Le voici : “ Les dépens des instances et procédures qui sont déclarées pées, ne doivent être adjugés de part ni d'autre. ” Ce sont les mêmes termes que Lamoignon avait employés. Lange a donc fait comme Auzanet ; il les a pris du manuscrit du célèbre Président dont l'un et l'autre se sont appropriés le sentiment et la rédaction, sans néanmoins lui en tenir compte.

Dunod, *des prescriptions*, p. 200, cité par l'appelant, dit : “ comme elle (la demande) périt par la faute de l'une et l'autre des parties, et que les actes en deviennent inutiles, l'on adjuge point de dépens. ” Dunod n'a pas copié les propres termes de Lamoignon, mais a du moins l'honnêteté de faire remarquer que le sentiment qu'il exprime est emprunté à ses *arrêlés*.

Pothier enfin a répété la même chose dans son traité de la procédure. Mais ni lui, ni Lamoignon, ni Auzanet, ni Lange, ni Dunod, ne citent aucun arrêt pour appuyer leur sentiment. Le simple projet de loi de Lamoignon semble être l'unique autorité des quatre autres. Il me semble que, quelque respectable que soit cette autorité, elle ne saurait prévaloir sur une jurisprudence consacrée par un aussi grand nombre d'arrêts que celui que j'ai donné, encore bien moins en présence des lettres-patentes du roi, de 1778, que j'ai citées plus haut, et qui n'ont été portées que six ans après la mort de Pothier. Nous devons croire que si ce savant jurisconsulte eût survécu à ces lettres-patentes, et qu'il eût eu le temps de retoucher son traité de la procédure, il en aurait fait disparaître le passage ci-dessus transcrit, que l'appelant a invoqué, et qui est probablement la cause de l'erreur que MM. Carré et Chauveau semblent avoir commise.

L'article précité de l'ordonnance de 1667, qui porte que *toute partie*, soit principale ou intervenante, *qui succombera* sera condamnée aux dépens, est général ; il ne comporte

aucune exception qui puisse s'appliquer à la péremption d'instance. Si l'on considère la question sous le rapport de l'équité, il me semble qu'il y a la même raison de condamner aux dépens la partie qui succombe par une péremption d'instance, que celle qui succombe autrement.

Les auteurs s'accordent à dire que la péremption n'est autre chose qu'une prescription, et quand, au moyen de l'une de ces prescriptions ou même par tout autre moyen de défense, une partie réussit à faire débouter son adversaire de sa demande, même lors qu'il y a réserve d'un *sauf à se pourvoir*, elle obtient ordinairement les dépens. Pourquoi en serait-il autrement lorsqu'il s'agit de la prescription, appelée péremption, la sentence adjudicative de cette péremption ayant l'effet de renvoyer absous de la demande celui qui l'invoque, quoique son adversaire, s'il est encore à temps, puisse se pourvoir par une nouvelle action? "Qui se désiste d'un procès, doit les dépens jusqu'au désistement." *La Peyrère*, t. 1, vbo. Dépens, p. 350. Est-ce que la partie qui laisse *périmér* sa demande, n'est pas censé se désister elle-même de cette demande par son propre fait? Il ne tenait qu'à elle de procéder. Sur la contestation qui donna lieu à l'arrêt ci-dessus cité du 4 avril 1732, rapporté par Bridon sur Menelet, l'avocat de la partie demanderesse en péremption disait: "que le parlement de Bretagne a admis la péremption, mais que toutes les fois que le défendeur originel s'est prévalu de cette prescription, il n'a pas hésité de faire supporter aux demandeurs toute la peine des frais de la procédure périmée; que cette usage était bien judiciaire, 1o. parce qu'il est raisonnable qu'un demandeur qui a abandonné son instance par la cessation de poursuites pendant trois ans, supporte les dépens qu'il a occasionnés, puisqu'ils dégénèrent en frais frustrées. 2o. Parce que la péremption étant une voie ouverte au défendeur par l'ordonnance de Roussillon, il lui était indifférent de gagner son procès par cette voie, par celle du fond, qui était dans le cas particulier également bonne." Des considérations

semblables, et d'une force non moins grande, sont présentées par l'avocat de l'une des parties à un arrêt du 12 Février, 1684, rapporté au 2e tome du "Journal du Palais" par Blondeau, et rendu sur la question de savoir "si la "péremption d'instance peut être opposée au demandeur "par le défendeur qui n'a point constitué de procureur sur "l'assignation à lui donnée."

Après avoir fait remarquer que, quand l'ordonnance a introduit la péremption faute de poursuites pendant trois ans, elle a eu deux fins : "la première de *punir* la négligence du demandeur, lorsque pouvant poursuivre la partie, il cesse de le faire pendant trois ans ; la seconde, *ne processint in infinitum*, qui est le même motif des prescriptions qui éteignent l'action, au lieu que la péremption n'est que pour faire considérer une instance comme si elle n'avait jamais été commencée," l'avocat poursuit : "si le demandeur néglige de faire condamner un défaillant, ne faut-il pas demeurer d'accord qu'il est beaucoup plus blâmable que celui qui, lassé par les chicanes de sa partie et quelquefois ruiné en frais, ou dans l'impuissance par son peu de biens, cesse de poursuivre pendant trente ans. En un mot *il faut poser pour maxime que la péremption, ainsi que la prescription, court contre celui qui peut agir ;* et qu'il n'y a personne qui puisse dire que le demandeur ne peut pas poursuivre sa partie, parce qu'elle n'a point comparu par procureur."

J'ajouterai à ce qui précède les observations des annotateurs de Duplessis sur la Coutume de Paris, 3e Édition de 1709, p. 511 : "L'effet de la Péremption est d'empêcher que les procès ne soient immortels, comme dit la loi ; de sorte que la péremption est en faveur du défendeur : car s'il n'est obligé qu'à se défendre, il ne doit point poursuivre contre lui, il suffit qu'il allégué ce qu'il croit nécessaire pour sa défense, *mais toute la diligence doit être de la part du demandeur qui a intérêt d'obtenir une condamnation.*" Plus d'un siècle après, écrivant sur la même matière, Pon-



cet, dans son traité des actions, No. 205, exprimait le même sentiment que les annotateurs de Duplessis : " Bornons-nous à dire un mot de la péremption d'instance qui est moins un vice, qu'un *désistement* de la procédure intentée.... C'est le demandeur qui a intérêt à obtenir jugement ; c'est donc lui qui a intérêt de soutenir et de poursuivre l'instance : si de son côté le défendeur y est intéressé, ce n'est que d'une manière indirecte et secondaire. L'abandon de l'instance, c'est-à-dire, de l'exercice de l'action de la part du demandeur, ne peut donc qu'être favorable au défendeur quand il ne fait que se défendre."

" Mais le demandeur peut abandonner son instance, ou expressément, ou tacitement. Il l'abandonne tacitement s'il cesse de poursuivre pendant le temps que la loi a fixé pour prescrire les instances. Cette prescription faisant tomber l'instance, prend pour cette raison le nom de péremption d'instance, du verbe *perimere*, détruire, éteindre."

Au bas de la page déjà citée du 3e tome de Carré et Chauveau, on trouve la note suivante, relativement aux dépens encourus sur la péremption, sur la question de savoir si le défendeur n'est pas lui-même en faute de n'avoir pas hâté la fin du procès, en obtenant congé de la demande, et si pour cela il ne devrait pas supporter ses propres frais. " Nous ne croyons pas, dit l'annotateur, que le défendeur soit en faute pour n'avoir pas hâté la fin du procès ; ce n'est pas lui qui avait entamé la discussion, et s'il n'a pas cru devoir provoquer une décision toujours incertaine, il a fait preuve d'une sage circonspection dont il ne peut être puni." La partie qui demande la péremption d'instance, et qui obtient un jugement adjudicatif de cette péremption, ne serait elle pas *punie*, si les frais que son adversaire l'a mise dans la nécessité de faire, devait être mis à sa charge, uniquement parce que cet adversaire n'aurait pas jugé à propos de conduire à fin, une procédure qui, jugée au fonds, aurait pu faire prononcer contre lui une condamnation de dépens ? Y a-t-il justice, équité, en pareil cas, dans une

absolution de dépens ? L'affirmative sur cette question, me paraît bien difficile à comprendre ; ce qui peut être facilement démontré à l'aide d'une hypothèse qui malheureusement reçoit sa justification très souvent par les faits. Jacques, qui ne possède rien au monde, et par conséquent est insolvable, est néanmoins porteur d'un titre authentique qui fait apparaître au premier abord de l'existence d'une créance contre Pierre. Il sait que celui-ci a les moyens de repousser sa demande, qui est tout à fait injuste ; mais il sait aussi qu'il en coulera à Pierre des sommes énormes pour établir et prouver ses moyens de defenses, sommes que lui, Jacques, au cas d'un jugement le déboutant de sa demande avec dépens, il ne pourra rembourser à Pierre. Il calcule donc, en introduisant sa demande, deux choses possibles ; ou que Pierre préférera de suite se soumettre à l'imposition illégitime qui résulte de cette demande injuste, plutôt que de s'exposer à encourir pour la repousser, quoiqu'ayant la certitude de succès, des frais qui excèdent le chiffre de cette demande, mais dont il sait qu'il ne pourra jamais être remboursé ; ou bien que, ne donnant pas suite à sa demande, et Pierre ne voulant pas de son propre gré encourir des frais énormes pour la faire juger au fonds, il y aura tout au plus lieu contre lui, Jacques, à la péremption d'instance. Et, dans ce cas, selon le système de l'appelant, les frais encourus par Pierre, par la faute, la mauvaise foi et la cupidité de Jacques, devront néanmoins ne pas être mis à la charge de ce dernier, mais bien à celle de Pierre, sans espoir de recours. C'est un système que ni la loi, ni l'équité, ni la morale, ne sauraient avouer.

Les auteurs qui, en copiant le projet de législation de Lamoignon, se sont prononcés contre la condamnation aux dépens sur une péremption d'instance, ont dû, comme l'avait dit Grimaudet longtemps auparavant, et comme l'ont dit depuis Dunod et Ferrière, penser que, l'instance étant *périe* par le laps de trois ans, il ne restait plus rien à faire revivre des actes de la procédure, et que ces actes étaient devenus *inutiles*, selon l'expression de Dunod.

Ferrière qui, dans son grand commentaire, tome 3, édition de 1715, p. 314, col. 1, no. 41, en imitant l'exemple d'Auzanet et de Lange, a transcrit mot pour mot le passage ci-dessus cité de Lamoignon, sans néanmoins lui en tenir compte, savoir : " que les dépens des instances et procédures qui sont déclarées *péries*, ne doivent être adjugés de part ni d'autre," ajoute que " c'est parce qu'elles sont éteintes et détraites, comme si elles n'avaient jamais été faites, et partant elles ne peuvent produire aucun effet." Cela pouvait bien être vrai dans le système de Grimaudet qui, conséquent avec lui-même, disait que les trois années requises pour la péremption une fois écoulées, le juge ne pouvait plus prononcer de jugement sur l'instance ; mais cela n'est pas vrai dans le système de la plus part des auteurs, consacré par la jurisprudence, que la péremption peut être couverte, et par conséquent tous les actes de procédure antérieurs continuer d'avoir force et effet, de même que s'il n'y avait pas eu lieu à péremption.

Du reste, dans l'ancien droit français, nonobstant la péremption acquise et adjugée, Rodier, dans son commentaire sur l'ordonnance de 1667, édition de 1770, p. 360, nous dit que " les actes probatoires faits pendant le temps de l'instance, tels que les enquêtes, et autres, subsistent, et l'on peut s'en servir dans une nouvelle instance, et les frais peuvent entrer en taxe. Il renvoie à Lamoignon et à Lange. En effet, le premier, au tome 3 de ses *Arrêts* déjà cité, p. 316, et le second, tome 1er., aussi déjà cité, p. 528, soutiennent que ces " actes probatoires " demeurent et subsistent après la péremption acquise. C'est aussi le sentiment de Pothier, dans son traité de la Procédure Civile, déjà cité, p. 88, or si, comme le dit Rodier, les frais de ces actes probatoires faits dans l'instance périmée, et employés dans une seconde instance *peuvent entrer en taxe*, ils étaient donc dûs à la partie qui les avait faits dans la première instance, et à cause de cette première instance. Ils lui étaient donc dûs par sa partie adverse dans cette

même instance, et cela du moment qu'elles les avait encourus. Si ces frais lui étaient dûs dans cette instance, pourquoi lui seraient-ils refusés par le jugement adjudicatif de la péremption? S'il est vrai que, quoique ces frais lui fussent ainsi légitimement dûs dans la première instance, il ne pût néanmoins les répéter de son adversaire que dans le cas où celui-ci porterait une nouvelle action contre lui, il s'ensuivrait qu'il serait au pouvoir de ce dernier, en s'abstenant d'intenter cette nouvelle action, de s'exempter de payer une dette qui n'en serait pas moins bien et dûment acquise à son adversaire. C'est en arriver logiquement à une conclusion qui me paraît être absurde.

Tout considéré, je suis d'opinion que, dans notre droit sur la matière, qui est l'ancien droit français, la péremption d'instance peut, selon l'exercice raisonnable du pouvoir discrétionnaire des Juges, entraîner une condamnation aux dépens contre la partie au préjudice de laquelle cette péremption est déclarée. Il paraît que telle a été la pratique suivie par la Cour Supérieure à Montréal, mais qu'il n'en a pas été de même à Québec, où la question a été diversement jugée, tantôt dans un sens, tantôt dans un autre. L'appelant nous a cité la cause de Fournier et La Compagnie d'Assurance jugée à Québec, le 8 avril 1856, et rapportée dans le 6e volume des "Décisions des Tribunaux du Bas-Canada," p. 97, dans laquelle les dépens n'ont pas été accordés. J'ai eu occasion de vérifier dernièrement une autre cause jugée dans la même juridiction, le 7 oct. 1854, (*Shaw et al. vs. Jeffery*) dans laquelle l'instance a été déclarée périmée, et les demandeurs déboutés de leur action, sans mention de dépens dans le jugement. D'un autre côté, l'intimé a cité deux causes dans la même juridiction, dans lesquelles le jugement adjudicatif de la péremption d'instance a prononcé la condamnation avec dépens, savoir la cause de Rouleau vs. Gagnon, jugée le 24 nov. 1853, et celle de Donnelly vs. Hearn, jugée le 9 avril 1855. J'ai vérifié moi-même ces jugements.

Enfin aussi récemment que le 16e jour de mars dernier, dans cette Cour, l'appel de Rigney et autres contre Matilda Martin, intimée, a été déclaré périmé, et les appelants condamnés aux dépens.

Le jugement de la Cour Supérieure rendu à Montréal, est confirmé avec dépens.

CHERRIER, DORION et DORION, pour l'appellante.

J. F. SMITH, pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.  
APPEAL SIDE.

Before:—SIR L. H. LAFONTAINE, Bart., Chief Justice,  
AYLWIN, DUVAL and CARON, Justices.

RENAUD..... *Appellant.*  
and  
GUGY..... *Respondent.*

Held:—1o. That a foreclosed party is entitled to one *juridical* day's notice of the inscription *aux enquêtes*, under the 12 Vic., Cap. 38, sec. 25.

2o. That a judgment in an action *en réintégrande* which does not describe the property affected by the judgment, will be reversed in appeal, on the ground of vagueness.

Jugé:—1o. Que dans le cas de foreclosure la partie forclosée a droit à un jour d'avis d'inscription aux enquêtes, en vertu de la 12 Vic., ch. 38, sec. 25.

2o. Qu'un jugement dans une action *en réintégrande* qui ne donne pas une désignation de la propriété affectée par le jugement, sera renversé sur appel, sur le principe que tel jugement est vague.

Judgment rendered the 13th. September, 1858.

The action was *en réintégrande* against the appellant, defendant in the Court below. The action was returned on the 20th. November, 1857, and an appearance filed for the defendant on the same day. On the day following, the defendant issued an action *en garantie* against one Dean, and made the same returnable on the 5th. December. On the 2nd. December a demand of plea was made upon the defendant-in-chief. On the 5th. the action *en garantie* was

returned, and a motion filed, calling upon the defendant *en garantie* to answer the demand of plea made by the principal plaintiff. On the 9th. an appearance was filed for the defendant *en garantie*, and a plea demanded to the action *en garantie* on the 28th. On the 26th. January, the respondent, plaintiff-in-chief in the Court below, foreclosed the defendant-in-chief, and, on the 13th. March following, inscribed the cause *aux enquêtes, ex parte*, having served the notice on the defendant-in-chief the day before. Witnesses were examined on the 15th. March. The defendant-in-chief then notified the plaintiff that on the first day of the ensuing term he would move the Court to strike the cause from the roll *des enquêtes*, on the ground that on the day on which the notice of inscription on the *enquêtes* was served upon him, to wit, the 12th. March, no inscription had in fact been filed ; and that the inscription was not filed till the 13th., the day following, and for leave to be allowed to plead to the action. On the first day of the April term this motion was rejected. On the same day the defendant-in-chief again moved the Court to be allowed to plead to the action, on such terms as the Court might think fit, and at the same time tendered his plea for the consideration of the Court. This motion was also dismissed. On the third day of term he renewed his motion to be allowed to plead upon taking short notice of trial, and upon payment of costs. This motion was likewise rejected ; and the following final judgment pronounced in the cause :—

“ La Cour ayant vu et examiné, tant le bref de sommation, la déclaration, les preuves et le plan de record, et entendu le demandeur *ex parte*, faute de défenses à l'action, le défendeur ayant été dûment forclos de plaider, et sur le tout mûrement délibéré : Considérant que le lot de terre, situé dans la Seigneurie de Beauport, la propriété de lui le dit défendeur, a été par lui acquis du nommé John Henderson qui en a acquis un titre nouvel de l'Honorable Antoine Louis Juchereau Duchesnay, alors seigneur de la dite

seigneurie, par acte passé devant Maître Taché et confrère, notaires, en date du dix-sept janvier mil huit cent vingt et un, et que le dit lot ou compeau de terre, désigné dans la déclaration du demandeur, était alors borné par la rivière Beauport en l'état dans lequel icelle était alors, la superficie du dit lot étant alors d'environ quatre arpents : Considérant que ni le dit John Henderson, ni le défendeur, étant ainsi borné par le bord sud et sud-ouest de la dite rivière Beauport, n'avaient aucun titre ou prétention légale pour réclamer ou prétendre aucun droit de propriété au delà du dit bord, ni de détourner ou changer par travaux ou autrement le cours du chenal de la dite rivière Beauport : Considérant que le demandeur, comme représentant le dit sieur Duchesnay, a possédé et possède tout le domaine de la dite seigneurie depuis plus d'an et jour, publiquement et paisiblement, savoir : depuis vingt-deux ans, avec justes titres et de bonne foi ; que néanmoins le dit défendeur, durant les trois mois avant l'institution de la présente action, par mauvaise foi, et dans le dessein d'ajouter à sa propriété et de nuire au dit demandeur, a empiété et continue encore à empiéter sur la propriété dont le dit demandeur est ainsi en possession, savoir, à commencer à un angle près de la ligne qui sépare la dite terre du demandeur de celle du nommé Galbraith, en continuant tout le long de son front, et que là, entre autres places et plus bas, lui le dit défendeur, dans la vue d'accaparer du terrain, a changé le cours et la direction de la dite rivière, et au moyen de charrettes et de tombereaux, pleins de terre prise sur la propriété du dit demandeur, a bouché et rempli de terre le vrai chenal de la dite rivière, et a fait creuser et ouvrir un autre chenal sur le terrain du dit demandeur, à son détriment et au danger de faire inonder le reste de la terre du dit demandeur, savoir le dit domaine appartenant autre fois au dit sieur Duchesnay : Considérant que le défendeur n'avait pas le droit de passer du côté nord-est de la dite rivière, ni de faire des angles aigus aux pointes d'un quai, ayant l'effet de faire ronger et emporter le terrain du dit demandeur, ni de ré-

trécir la dite rivière à la largeur d'environ sept pieds, non plus que de miner et emporter des cailloux qui protégeaient et défendaient la rive du côté du dit demandeur, et de les transporter à l'autre côté de la dite rivière, et en faisant des remparts pour lui-même et des embarras pour le dit demandeur : La Cour, en conséquence, adjuge et ordonne, que le dit demandeur soit réintégré et mis en possession de tout le terrain dont il a été spolié, et condamne le défendeur, sous trente jours de la signification du présent jugement, à démolir et raser tous les quais qu'il a érigés au préjudice du dit demandeur, d'emporter tous les embarras de cailloux, pierres et autres, afin de donner à la dite rivière son libre cours, et mettre les lieux, en le même état dans lequel ils étaient auparavant les actes illégaux dont le demandeur se plaint, et à défaut par le défendeur d'obéir au présent jugement, il est permis au demandeur de ce faire aux frais et dépens du dit défendeur.

Et la Cour, faisant droit sur les conclusions contenues dans la déclaration du demandeur, aux fins que des bornes soient plantées entre les héritages des dites parties, renvoie, quant à présent, les dites conclusions en bornage, réservant au dit demandeur son action en bornage suivant les titres et la possession légale des dites parties, après que le défendeur aura été mis en demeure. Et, finalement, la Cour condamne le défendeur, à raison des dommages et torts soufferts par le demandeur comme ci-dessus mentionné, de payer au demandeur la somme de deux cents cinquante louis courant ; avec intérêt de ce jour, et aux dépens de la présente action."

It was from this judgment, as well as from the judgments rendered on the motions above referred to, that the appeal was instituted.

For the appellant it was contended that the inscription *aux enquêtes* in the cause was irregular, insufficient and illegal, inasmuch as no notice thereof had been legally



served ; that the notice was served on the 12th March, and that no inscription had been filed on that day, nor on any day previously thereto, but had, on the contrary, only been filed on the day after, and that, therefore, no notice as required by law had been served ; that moreover, the delay of one day required by law to intervene between the inscription and the adduction of evidence, had not been allowed in the cause, inasmuch as the inscription was filed on saturday, the 18th., and evidence was adduced on monday the 15th. March ; that the judgment on the merits was vague, indefinite and insufficient, and did not describe the land or premises which it condemned the appellant to restore the respondent, and of which the latter pretended to have been spoliated ; and that, therefore, such command or judgment was not susceptible of execution ; that the judgment further could not be executed inasmuch as it condemned the appellant to demolish all the wharves by him erected to the prejudice of the respondent, without specifying what wharves had been so erected ; that the proceedings of the respondent in the Court below were irregular and ought to have been set aside, and the appellant permitted to plead to the action ; and that the final judgment was one not warranted by the evidence adduced in the cause, and was not susceptible of being carried into effect.

The respondent argued that upon reference to the proceedings in the cause it would be found that the question of form which the appellant had raised was one from which he could obtain no relief by his appeal, as it would be seen that every liberality had been shewn him, and even much more delay in the proceedings awarded him than he was entitled to by law ; that the demand of plea was served upon him on the 2nd. December, and he was only foreclosed on the 26th. January following ; that no delay to plead had ever been sought or obtained by the appellant to enable him to bring his action *en garantie*, and that therefore the respondent could not legally take any notice

whatever of the action *en garantie* ; and that if the appellant thought proper by want of diligence, to run the risk of allowing the defendant *en garantie* to plead to the action for him, without obtaining permission to that effect, he did so upon his own responsibility, and the respondent could not be made answerable for the default or error of his adversary ; that although the appellant had not obtained such delay to plead, yet if he had used even ordinary diligence he would have been in time to cause his *garant* to plead for him, for instead of foreclosing the appellant on the third juridical day after the 2nd. December, as he could have done, he allowed him to the 26th. January following, and as appeared by the proceedings, his *garant's* delay to plead expired on the 31st. December, twenty six days before the respondent foreclosed the appellant. That there could therefore be no complaint of sharp practice, or of surprise. That moreover the appellant allowed two terms to elapse before he even made application to strike the foreclosure and to be allowed to plead ; that it was only after the respondent had examined witnesses, and had inscribed the cause for hearing, that the appellant moved to be allowed to plead.

That with respect to the judgments on the two motions complained of, he, the respondent, was prepared to show that they were perfectly correct, inasmuch as apart from the great liberality and correctness manifested by the respondent's proceedings in the cause, the motions could not be granted, because they sought to allow the appellant to re-enter the cause and to plead, *sans retardation de cause* ; and that it was perfectly impossible to allow him to re-open the cause and to plead, without retarding the respondent.

That with respect to the final judgment on the merits, he contended that in England, a land in which technical objections of all kinds were much favored, it was a maxim that some irregularities which might have been successfully pleaded by demurrer, were cured by verdict ; and that this

maxim should apply with greater force to such cases as the present. That the plan of the premises which he had filed in the cause had been so mutilated by the appellant's attorney, who had been entrusted with the record, that it would be impossible for the Court to obtain a correct idea of the property, or to say whether the judgment of the Court below were a correct one or not, and that therefore this grievance was one which the Court would doubtless redress by the judgment it would render in the cause.

DUVAL Justice.—After reciting the facts of the case remarked, that even if the proceedings in the Court below had been regular, the Court here would have been of opinion that the motion made on behalf of the appellant, defendant in the Court below, ought, as a matter of equity, to have been granted, as no party ought to be shut out from the right of placing himself fairly before the Court; but the ground upon which the Court have principally based its judgment reversing that of the Court below, was founded upon the irregularity of the respondent's proceedings in that Court. The inscription was only filed on the 13th. of March, and he proceeded to the adduction of evidence on Monday the 15th., allowing only the Saturday to intervene; now the 12 Vict., Chap. 38, Sec. 25, says that any party foreclosed, shall be entitled to, at least, one clear day's notice of the inscription; it is very evident therefore that the notice required by law was not given to the defendant of the inscription *aux enquetes*, inasmuch as Sunday is a *dies non*, and cannot be reckoned in computations of time, as well according to the principles of the Roman law, as to those of our own law. It is evident that this delay means a *juridical* day; for this reason therefore the judgment of the Court below must be reversed. There is however another consideration in this case. The judgment appealed from is drawn out in such general terms that it does not admit of execution. It orders the defendant to give up to the plaintiff all the ground of which he has been spoliated,

without describing the ground or defining its extent ; so that the defendant could not be compelled to give up either two inches or as many acres, or any precise extent of ground whatever. It is impossible for the Court here therefore to confirm a judgment like this.

Sir L. H. LaFontaine, Bt., Chief-Justice.—I concur in the judgment, and would have reversed the judgment of the Court below on the ground of its vagueness if there had been no other reason for doing so ; but it is defective on the ground of the irregularity of the proceedings respecting the inscription *aux enquêtes*.

BELLEAU and JOLICŒUR, for appellants.

JONES, Ed. Counsel.

GUY, for respondent.

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### IN THE CIRCUIT COURT.—QUEBEC.

Before :—BOWEN, Chief-Justice.

No. 346.	{	MURPHY,.....	Plaintiff.
			vs.
		MOFFATT,.....	Defendant.
			and
	{	LEVY, <i>et al</i> ,.....	Opposants.

Held :—1o. That an opposition, made through the ministry of an attorney, will not be dismissed on the ground that it does not contain an election of domicile.

(1)  
2o. That the proper way to attack an opposition on the above ground, if defensible, is by exception à la forme, and not by motion.

Jugé :—1o. Qu'une opposition, faite par le ministère d'un procureur, ne sera pas renvoyée par la raison que telle opposition ne contient pas une élection de domicile.

2o. Que le mode d'attaquer une opposition, pour la raison ci-dessus, en supposant la raison bonne, est par exception à la forme, et non par motion.

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Judgment rendered the 22nd. day of September, 1858.

The plaintiffs moved for the dismissal of the opposition *afin d'annuller* filed in the cause, on the ground that it contained no election of domicile on the part of the opposants.

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(1) Cummings, vs. Moffatt and Levy *et al*, opposants, No. 3007. Meredith, Justice.

**SECRETAN** for plaintiffs, argued, that under the law of Lower Canada, every opposition, whether made and filed by the opposant in person, or through the ministry of an attorney, should contain an election of domicile, *à peine de nullité*, and that the practice had long been established to insert in every opposition an election of domicile; that this rule of law had never been departed from in the practice of the Court; that it was an essential formality, and that its omission was fatal to the reception of the opposition. In support of this view, he referred to various authorities. (1)

**POPE, THOS.** for opposants, contended that since the abrogation of the old rules of practice, it had not been customary to insert an election of domicile in the opposition. Under those rules it was absolutely necessary that this formality should be observed. The repeal of the rule proved, either that the election of domicile was no longer essential, or that other provisions had superseded the intervention of the rules of Court. The authorities referred to on the other side had fallen into desuetude even before the promulgation of the old rules, for if they had force of law at the time the rules were made, there would have been no necessity to re-enact their observance. The repeal therefore leaves the question as it stood before. There is no statutory enactment enjoining the observance of this formality. But all doubt on the subject is obviated by a reference to the 12 Vic., cap. 38, the 23rd. sect. of which provides that "every defendant or other party in or to any suit or action who shall appear in person shall be considered as having, for all the purposes of such suit or action, and of all proceedings incident thereto, or consequent thereon, by such appearance, elected his legal domicile at the office of the prothonotary of the Court in which such suit or action shall have been instituted; and all notices and all services of

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(1) 360th. art. of the Custom of Paris :—Arrêt of 6th. May 1634 :—Joly, Ordonnance de Blois, art. 175 :—Declaration of 26th. January, 1609 :—Neron, vol. 1, p. 360. Also, to the case of, Vallières vs. Robitaille, No. 1019 of 1821, decided in the district of Quebec.

“ papers or documents in such suit or action which should otherwise be given or made by one attorney *ad litem*, to or upon another, shall be considered as having been legally given or made at such prothonotary’s office.” And by the 101st. sec., it is further provided that each attorney practising in the Circuit Court in any circuit, shall file in the office of the clerk thereof, his election of domicile, and in default of doing so, any notice or pleading shall be well served upon him if left for him at the office of the clerk for such circuit. The attorney for the opposants has complied with this provision, why should an attorney be compelled to repeat this act every time he makes an opposition ?

The sole object should be to discover the opposant’s legal domicile. If the opposant appears in person, but fails to elect his domicile, the statute appoints one for him ; so that the whole of the former provisions respecting elections of domicils have been abrogated. Besides this question cannot be raised by way of motion ; being an objection to the form, the correct mode of testing its validity would have been by an *exception à la forme*.

**SECRETAN.**—In urging this objection by motion instead of by *exception à la forme*, I have followed the practice adopted and acted upon in every district in Lower-Canada, and this course I take to be analogous to other points of practice observed in this Court, as for instance, the practice is to move for the dismissal of an action for want of particulars, and not to urge such defect by *exception à la forme*. Well, in this instance, the ground of objection is precisely the same,—a want of particulars ; the party opposant does not allege his domicile, he does not give the plaintiff all the particulars he is entitled to by law, and therefore the Courts have always held that this is the proper and only correct mode of urging this objection to oppositions. In proof of this point I would refer the Court to the case of *Lizotte vs. Caron*, No. 151, of 1818, District of Quebec :—*Boudreau et*

*al vs. Pontré*, 6 Lower-C. Reports, p. 72 :—*Morrin vs. Daly*, 6 Lower-C. Reports, p. 431 :—*Scholefield vs. Rodden*, *Id.* p. 479 :—*Leverson vs. Cunningham*, *Id.* p. 483 :—*Abbot vs. Montreal and Bytown R. R. C.*, *Id.* p. 428 :—*Fournier vs. Russell*, 7 Lower-C. Reports, p. 130.

BOWEN, Chief-Justice.—The question submitted arises in two cases, the one under consideration, and the case of *Dorsey vs. Moffatt* No. 347. I am of opinion that by our statute law, no election of domicile is necessary in an opposition filed through the ministry of an attorney of this Court ; and that even if such an omission in an opposition were fatal, the proper mode of urging the objection would be by *exception à la forme*, and not by motion. I therefore dismiss the motions in both cases.

SECRETAN and DUNBAR, for plaintiff.

POPE, THOS. for opposants.

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BANC DE LA REINE, } DISTRICT DE MONTRÉAL.  
EN APPEL.

Présents:—Sir L. H. LaFontaine, Bart., Juge-en-Chef,  
AYLWIN, DUVAL, et CARON, Juges.

PLATT,..... *Appelant.*

et

CHARPENTIER,..... *Intimé.*

Dans l'espèce d'un legs fait par un testateur d'un immeuble à sa femme, en jouissance, sa vie durant, et à son décès à un fils du testateur, George, en jouissance sa vie durant; et à la mort de celui-ci, ou au cas de son décès, et du décès de la femme du testateur, au fils aîné né ou à naître du dit George, et aux héritiers issus ou à naître légitimement de ce fils aîné; et à défaut de telle descendance, au second, troisième, quatrième et à tout autre fils et tous autres fils du dit George, l'un après l'autre suivant la priorité d'âge, et aux enfants respectifs de tels fils; l'aîné et ses enfants étant toujours préférés à un frère plus jeune, et à défaut d'enfants mâles semblable disposition en faveur des filles:—

Jugé:—Que le fils aîné de George ayant survécu ce dernier et la femme du testateur, a recueilli le legs en toute propriété sans charge de fidéicommis, soit envers ses enfants, soit envers ses frères et sœurs, qui n'étaient appelés à recueillir que conditionnellement, au cas où lui, fils aîné, n'aurait pas recueilli.

On a bequest by a testator of real estate to his wife, during her natural life, and after her decease to the testator's son, George, during his natural life; and after his decease, or if he and the wife of the testator should both have died before the testator, then to the eldest son of the body of the said George, lawfully begotten, and the heirs of the body of such eldest son; and in default of such issue, to the second, third, fourth and all and every other son and sons of the said George, one after another, by priority of birth, and to the children of such sons; the elder of such sons and his heirs always preferred to a younger son, and in default of such male issue, a similar bequest to the daughters:—

Held:—That the eldest son of George having survived him and the testator's wife, has taken the said bequest in full property without being charged with any *fidéicommis*, or trust, in favor either of his children, or of his brothers and sisters, who could have claimed the said bequest only in default of the said eldest son or his heirs.

Jugement rendu le 3 septembre 1858.

Sir L. H. LaFontaine, Bart., Juge-en-chef.—Le 24 novembre 1856, vente par le demandeur au défendeur d'un terrain situé rue Sherbrooke, cité de Montréal; Prix, £500, payable à demande; l'action a pour objet d'en recouvrer le montant.

Dans l'acte de vente, il est dit que le terrain appartient au vendeur, "pour lui avoir été légué par feu John Platt, "son grand père, en vertu du testament solennel de ce dernier, en date du 30 décembre 1807, et prouvé en Cour,



“ le 31 Janvier 1811 ; ” puis il est ajouté : “ les dites parties déclarent expressément par ces présentes que l'intention du vendeur est de vendre au dit acquéreur la propriété elle-même du dit terrain, franche et quitte de toutes hypothèques et substitutions quelconques, et que, dans le cas qu'aucune telle substitution se déclarerait du dit terrain, le dit acquéreur sera libéré du paiement du prix de vente et cet acte demeurera nul et de nul effet, comme s'il n'eût jamais été signé.”

Par ses défenses à l'action, Charpentier a prétendu qu'aux termes du testament en question, l'appelant était grevé de substitution. Cette prétention a été accueillie par le juge de première instance ; il a débouté l'appelant de son action et déclaré nul l'acte de vente. Voici les principales clauses du testament :

8. “ I do give, devise and bequeath all my said estate and farm at the said Côte à Barron, at the head of the St. Lawrence Suburb of the City of Montreal aforesaid, (on part of which there is a constitut payable to the nuns of the Hôtel-Dieu, of twelve pounds, ten shillings, to be paid by the holder of the Estate), with all the houses, out-houses and buildings whatsoever thereon erected, together with the improvements thereon, and all the appurtenances thereunto belonging, unto my said wife Ann Wragg, from and immediately after my decease, for and during her natural life, without impeachment of waste ; and from and immediately after her decease, or if she shall die before me, then I give and devise the same to my said son George Platt, without impeachment of waste, for and during his natural life ; and immediately from and after the decease of the said George Platt, or if he and my said wife shall both die before me, to the eldest son of the body of the said George Platt lawfully begotten or to be begotten, and the heirs of the body of such eldest son lawfully issuing ; *and in default of such issue*, to the second, third, fourth and all and every other son and sons

“ of the body of the said George Platt severally, and successively and in remainder, one after another, in order and course as they respectively shall be in priority of birth, and the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing ; every elder of such sons, and the heirs of his body issuing being always preferred and to take before a younger of them, and the heirs of his body issuing, and in default of such male issue, to the first, second, third, fourth and all and every other daughter and daughters of the said George Platt, lawfully begotten or to be begotten, severally, successively, and in remainder, one after another, in order and course as they respectively shall be in priority of birth, and to the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, every elder of such daughters, and the heirs of her body issuing, being always preferred and to take before a younger of them and the heirs of her body issuing; and in default of such issue male and female, I do then hereby give and devise the said premises, to Elizabeth Mittleberger, wife of the said George Platt, for and during the term of her natural life only, with remainder to my own right heirs for ever.”

10th.—“ I do give my two houses in St. Paul Street unto my said wife Ann Wragg for and during her natural life, and from and immediately after her decease, or if she shall die before me, then I give and devise the said premises to my said son George Platt, for and during the term of his natural life ; and immediately after his decease I do give and devise the same unto *all the younger children* of my said son George, in lawful marriage born or to be born ; that is to say ; to all the said children of the said George Platt, *except the eldest son or eldest daughter of the said George Platt, as the same may be who shall have and take my estate and farm at the Côte à Barron, and my estate of 1000 Acres of land in the Province of Upper Canada herein before devised ;* equally to be divided

“ between them, the said younger children of the said George Platt, and each of their heirs and assigns respectively for ever, share and share alike ; and in default of such children to my lawful heirs for ever.”

La 9me clause à laquelle réfère la 10e, est dans les mêmes termes que la 8me avec cette différence, que la propriété léguée est une propriété dans le Haut-Canada dont il n'est pas présentement question.

Le terrain vendu à l'intimé fait partie de celui qui est légué par la 8e clause du testament.

Selon l'admission des parties, le testateur est mort peu de temps après avoir fait son testament ; George Platt, son fils est mort avant Ann Wragg, la femme du testateur ; la dite Ann Wragg a recueilli son legs, et à sa mort, en 1841, il y avait de vivant, à part l'appelant, fils aîné du dit George Platt, plusieurs autres enfants du dit George Platt, qui tous ensemble et collectivement ont recueilli le legs à eux fait par la 10e clause du testament ; l'appelant a recueilli les legs à lui faits par les 8e et 9e clauses ; à la date du testament les propriétés mentionnées en la 10e clause valaient cinq fois autant que les propriétés mentionnées aux 8e et 9e clauses ; l'appelant a eu deux enfants dont l'un est encore vivant, et l'autre est mort ayant laissé un enfant encore vivant ; l'appelant a également des frères et sœurs qui sont encore vivants, lesquels frères et sœurs sont les enfants du dit George Platt ; à la date du testament, le dit George Platt n'avait pas d'enfants.

A la mort de la dite Ann Wragg, qui a survécu au testateur, la terre de la côte à Barron devait être rendue à George Platt, si celui-ci lui survivait, et à la mort du dit George Platt, sa propriété devait être restituée à son fils aîné et à ses hoirs. Si la dite Ann Wragg fût décédée avant le dit George Platt, celui-ci devait recueillir à la mort de son père, et son fils aîné ou ses hoirs, immédiatement après lui. La dite Ann Wragg et le dit George Platt venant tous

deux à mourir avant le testateur, le fils aîné du dit George Platt, c'est-à-dire l'appelant, recueillait immédiatement après le décès du testateur. Ann Wragg et George Platt ne devait jouir l'un après l'autre, que *durant leur vie naturelle*. La propriété en question devait passer d'abord à George Platt, *dès et immédiatement après le décès* de la dite Ann Wragg ("from and immediately after her decease") et ensuite au fils aîné de George, aussi *dès et immédiatement après son décès* ("immediately from and after the decease of the said George Platt"). Les mots ci-dessus soulignés sont les propres termes du testament, c'est-à-dire, la traduction de ces termes. Je vois que le testateur, ou celui qui peut avoir rédigé son testament pour lui, savait quels termes il fallait employer pour exprimer un fidéicommiss. Les mots "durant sa vie naturelle" et "dès immédiatement après son décès," indiquant clairement que l'intention du testateur était de charger Ann Wragg et George Platt de rendre tour-à-tour la chose qu'ils auraient recueillie. Or c'est justement quand une telle charge est imposée, qu'il y a fidéicommiss, qui est défini par Thévonot d'Essaule, p. 5, no. 7, "une disposition de l'homme, par laquelle, en gratifiant quelqu'un expressément ou tacitement, on le charge de rendre la chose à lui donnée, ou une autre chose, à un tiers que l'on gratifie en second ordre."

C'est l'appelant qui a recueilli à la mort de son père, George Platt; ceci est admis. La substitution en vertu de laquelle il a ainsi recueilli s'est-elle éteinte et terminée en sa personne, ou devait-elle parcourir d'autres degrés, lui l'appelant ayant une fois recueilli? En d'autres mots, l'appelant a-t-il été chargé par le testateur de rendre la chose donnée? Et s'il l'a été, à qui devait-il la rendre? (1) Une

(1) Autorités citées par l'appelant.

Les fidéicommiss sont de rigueur.

Ricard, nos. 393, 256, 516, 510, Substitutions:—Merlin, Repert., vbo. Substitution directe, sect. 1, par. 2:—*Ibidem*, Fidéicom. sect. 9, sect. 10, p. 4, art. 1:—D'Aguesseau, Quest. sur les Substit., Quest. 20, p. 238:—Pothier, Substitutions, pp. 504, 509, et sect. 2, art. 3, par. 3.

Sur les conjectures.

2 Furgole, Testaments, p. 129, no. 209:—Ricard, Dispositions Conditionnelles,

première règle en cette matière, c'est que, si les substitutions ne sont pas odieuses, elles sont au moins de rigueur, et que, selon le sentiment de presque tous les auteurs, lorsqu'il y a des doutes sur ce qu'a pu être l'intention du testateur, l'on doit se garder d'une interprétation par voie de suppositions ou de conjectures, qui tendraient à étendre la substitution.

Voyons comment s'est exprimé le testateur dans le legs dont-il gratifie le fils aîné de George Platt: "to the eldest son of the body of the said George Platt, lawfully begotten or to be begotten, and the heirs of the body of such eldest son lawfully issuing." Remarquons, en passant, que ces mots "lawfully begotten" ou "of the body," n'ajoutent rien. C'est une addition superflue; Pothier, *Substitutions*, sect. 3. L'on voit que dans la clause qui vient d'être citée, il n'y a aucun terme qui impose à l'appelant ou à ses hoirs la charge de rendre à un tiers la chose donnée après qu'ils l'auront recueillie. Ils ne sont pas grevés par cette clause, on n'y trouve pas les mots "durant la vie naturelle" ou "dès immédiatement après le décès" de l'appelant ou de ses hoirs, mots que le testateur avait néanmoins employés immédiatement auparavant, afin de charger les deux premiers institués de rendre la chose, après qu'ils l'auraient

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no. 177:—Merlin, Repert. vbo. Substitutions Fidéicom. sec. 9:—Thévenot d'Es-saule, ch. 12:—Furgole, Commentaire sur les Substitutions, p. 108, p. 91.

Pas de transmission dans les Fidéicommiss.

D'Aguenneau, Quest. 26e sur les Substitutions:—Henrys, tome 1, liv. 5, quest. 25, tome 3, suite du livre 5, Quest. 71:—Ricard, No. 638:—2 Rousseau de Lacombe, Substitutions, dist. 3:—Despeisses tome 2, p. 184:—Merlin, Repert. vbo. Substitutions fidéicom. sect. 15, § 2:—Thévenot d'Essaule ch. 28.

De l'effet de la clause à lui et à ses hoirs.

Bourjon, tome 2, tit. 5, p. 57:—2 Rousseau de Lacombe, p. 234. Substit. 20:—Boniface, tome 5, livre 2, tit. 3, ch. 2:—Bergier sur Ricard, no. 258:—Pothier, Substitutions, p. 498:—Rolland de Villargues, p. 232 et suiv.:—Merlin, Repert. vbo. Substit. Fidéicom. sect. 8, par. 3, p. 559:—Despeisses, Testaments part. 1, tit. 1, sect. IV, no. 24:—*Ibidem*, Substitutions, art. 1. tit. 2, part. 1:—D'Aguenneau, Quest. 20, sur les Substitutions, p. 240:—Henrys, t. 3, suite du livre 5, quest. 97:—Cochin, t. 4, p. 136:—Montvalon, Successions, t. 2, p. 153 et suiv.

*Conditio nunquam disponit.*

D'Aguenneau, 19e Quest. sur les Substitutions:—Henrys, t. 3, suite du livre 5, quest. 86, quest. 97:—Ricard, Substitutions, part. 1ere, no. 453, et suiv. no. 383:—Despeisses, t. 2, sect. 6, art. 21, 22 et 23:—Louet et Brodeau, ch. 46:—Rousseau de Lacombe, vbo. Substitution, dist. 1ere:—Pothier, Substitutions, pp. 504, 503:—Furgole, Testaments, pp. 207-8-9, 129, 208, 213:—D'Aguenneau, Quest. 26e, p. 237:—2 Bellme, Philosophie du Droit, p. 377.

eu recueillie. Puisque le testateur savait de quels termes se servir pour établir un fidéicommiss, qu'il a lui-même choisi certains termes pour en créer un d'abord, qu'il a répété les mêmes termes pour en exprimer un second, celui dont il grevait son fils au profit de l'appelant, ne s'étant pas servi des mêmes termes, ni d'aucun autre équivalent, il me semble qu'on doit en conclure de toute nécessité que c'est parcequ'il n'entendait pas que son petit fils, le fils aîné de George Platt, fût, lui ou ses hoirs, grevé de substitution au profit de ses frères et sœurs, d'autant plus que le testateur avait soin de gratifier ceux-ci en même temps par une autre disposition de son testament. Ajoutons encore que la clause dont il s'agit ne laisse pas à l'intimé la faible ressource de prétendre que la chose donnée étant une fois recueillie par l'appelant, il y aura, quant à cette chose, interversion dans l'ordre de sa succession. Ses filles, comme ses fils, sans distinction d'âge, pourront y avoir leur part.

Mais, dit-on, George Platt était grevé, non seulement au profit de son fils aîné et des hoirs de celui-ci, mais encore au profit, d'abord, de ses autres fils et de leurs hoirs, en suivant la priorité de la naissance de ces fils puînés, et ensuite, de ses filles dans le même ordre. Cela est vrai ; mais ce dernier fidéicommiss, pour avoir son effet, dépendait d'une condition, d'un événement. En effet, immédiatement après la disposition pure et simple faite en faveur de l'appelant et de ses hoirs, il est dit ; "*and in default of such issue, to the 2nd., 3rd., 4th. and all and every other son or sons of the body of the said George Platt, &c, &c, and in default of such male issue, to the 1st., 2nd., 3rd., 4th. and all and every other daughter and daughters of the said George Platt, &c &c.*"

Les mots *in default of such issue*, se rapportent uniquement au cas où le premier fils légitime du dit George Platt n'aurait pas survécu à son père, et serait décédé sans laisser d'enfants, ou si, ayant laissé des enfants, ceux-ci seraient tous décédés avant le dit George Platt, de manière

que ni l'appelant, ni ses enfants n'auraient pu avoir et n'auraient pas en effet recueilli, n'étant pas vivants à la mort du grevé. Dans ce cas, mais dans ce cas seulement, un nouveau fidéicommiss était ajouté au premier, d'autres personnes se trouvaient appelées dans l'ordre indiqué au testament. Mais, dans le cas de l'appelant, comme dans le cas de chacune de ces autres personnes, le premier de ces appelés à la substitution, qui, dans l'ordre établi par le testateur, recueillait la chose donnée, à la mort du dit George, faisait cesser la vocation des autres. Car évidemment c'était à la mort du dit George Platt que la substitution devait s'ouvrir pour ne plus revivre. Tous les mots de la 8e clause, après les mots *in default of such issue* qui se rapportent à l'appelant et à ses hoirs, jusqu'aux mots *in default of such male issue*, s'appliquent aux fils puînés du dit George Platt, et aussi à leurs enfants, car ceux-ci sont compris dans la vocation, et cela sans distinction de sexe ou d'âge, comme l'étaient en premier lieu les enfants de l'appelant. Mais aucun de ces fils puînés, qui aurait recueilli à défaut de son aîné, ou de ses autres frères qui l'auraient précédé dans l'ordre des naissances, n'était, ni lui ni ses enfants, chargé de rendre et restituer. Du moment qu'il recueillait, la substitution était consommée. Dans le fait, si tous les enfants de George Platt étaient appelés, ils l'étaient avec subordination entr'eux dans l'ordre des degrés établis par le testateur ; mais un seul devait recueillir, lui ou ses enfants, ceux des degrés ultérieurs n'étant appelés qu'à défaut de ceux qui les précédaient, lors de l'ouverture de la substitution. (1)

La 10e clause du testament, à mon avis, prête un appui considérable à l'interprétation que je donne à la 8e. Deux maisons dans la rue St. Paul sont l'objet du legs contenu dans cette 10e clause. Elles sont, comme la terre de la côte à Barron, données d'abord à la dite Ann Wragg, puis au dit George Platt, pour en jouir chacun durant sa vie na-

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(1) Pothier, *Substitutions*, p. 500.

turelle. Tous deux sont chargés, et dans les mêmes termes, d'un fidéicommiss semblable à celui de la 8e section. Il est dit qu'*immédiatement après le décès* du dit George Platt les deux maisons passeront "unto all the younger children of my said son George.... except the eldest son or eldest daughter of the said George Platt, as the same may be, who shall have and take my estate and farm at côte à Barron, and my estate of 1000 acres of land in the province of Upper Canada, hereinbefore devised, equally to be divided."

L'on a vu que, par la 8e section, les filles de George Platt n'étaient appelées à recueillir la terre de la côte à Barron qu'au défaut d'enfants mâles de leur père, et encore, comme dans le cas d'enfants mâles, c'était l'aînée de ses filles. Or, rien n'est plus clair que le *fils aîné* ou la *filie aînée* dont il est question dans la 8e clause, est celui ou celle qui se trouverait l'être au décès du dit George Platt, à moins qu'un autre aîné prédécédé n'eût laissé des enfants encore vivants à cette époque. Dans le cas actuel, le premier fils, né du mariage du dit George Platt, à survécu à son père. C'est donc lui qui a *eux* et *pris* la terre de la côte à Barron. Il s'est donc, (et par suite ses enfants avec lui,) trouvé exclu du legs des deux maisons. Pourquoi en a-t-il été exclu? C'est parceque le testateur, en l'appelant à recueillir à l'exclusion de ses frères et sœurs, la terre de la côte à Barron et les 1000 acres de terre dans le Haut-Canada, a considéré qu'il lui faisait une part suffisante dans sa succession. Rien n'indique qu'il ait eu l'intention de soumettre le legs qu'il lui faisait à plus de charges ou de restrictions que le legs fait à ses frères et sœurs. Si ceux-ci devaient recueillir en pleine propriété, sans charge de fidéicommiss, quelle raison y a-t-il de prêter au testateur qui ne s'est pas exprimé à cet égard autrement dans un cas que dans l'autre, l'intention qu'il en fût autrement pour l'aîné de ses petits-fils, un enfant que d'ordinaire un ayeul préfère aux autres? Plus même, il pouvait se faire que, par l'évènement, l'appelant reçut une part bien



moins considérable que celle de ses frères et sœurs. Les parties ont admis que les deux maisons de la rue St. Paul valaient lors du testament, cinq fois plus que les propriétés que l'appelant avait recueillies, et qu'à la même époque George Platt n'avait pas encore d'enfant. George aurait pu mourir peu d'années après son père, ne laissant que deux ou trois enfants. Ce cas échéant, assurément l'appelant n'aurait pas été traité favorablement. A l'ouverture de la substitution, il aurait reçu beaucoup moins que ses puînés.

Je crois que les parties n'ont pas prétendu que les puînés, recueillant en vertu de la 10<sup>e</sup> clause, recueillaient aussi à charge de substitution. Cependant s'il était vrai que les mots *in default of such issue* dans la 8<sup>e</sup> clause, eussent l'effet de créer, non une substitution vulgaire ou directe, mais bien une substitution fidéicommissaire au profit des frères et sœurs de l'appelant, il faudrait donner à la dixième clause la même interprétation et la même étendue, car elle contient les mêmes mots, savoir, "and in default of such children, to my lawful heirs for ever."

L'enfant qui recueillera la terre de la côte a Barron, ne doit rien avoir dans le legs des deux maisons de la rue St. Paul. Il en est exclu par la 10<sup>e</sup> clause. Dans le système de l'intimé, l'appelant et sa descendance sont chargés d'un fidéicommis relativement à cette terre, mais ses frères et sœurs ne le sont pas quant aux deux maisons dont ils peuvent disposer à leur gré. L'appelant meurt sans enfants après avoir recueilli la terre. Cette terre doit passer à l'un de ses frères ou sœurs, ou à ses enfants. Mais ce frère ou cette sœur a déjà eu sa part dans les deux maisons à la mort de son père ; ils en ont même disposé. Cependant venant à recueillir la terre en vertu du prétendu fidéicommis, ils ne doivent rien avoir dans les deux maisons. A qui, alors, appartiendra leur part dans ces deux maisons ? Il n'en est rien dit dans le testament. Ce sera sans doute à leurs co-légataires de ces maisons. Mais supposons maintenant que, dans ce cas, ce ne soit pas un frère puîné de

l'appelant qui recueille la terre, ce frère étant mort avant lui, même avant leur père, mais que ce soit l'un de trois enfants de ce frère puisné ainsi prédécédé. Ces trois enfants, ayant survécu à leur grand père, George Platt, auront eu chacun un tiers de la part qui était destinée à leur père dans les deux maisons ; deux de ces enfants ne veulent pas profiter du fidéicommiss qui frappe la terre de la côte à Barron ; le troisième seul prend la terre. Il la prend parcequ'il remplace son père ; si celui-ci eût survécu et eût lui-même pris cette terre, il lui eût fallu perdre toute sa part dans les deux maisons. Mais celui de ces trois enfants qui n'aura eu qu'un tiers de cette part, venant ensuite à recueillir la terre de la côte à Barron, ne sera-t-il pas exposé à perdre ce tiers, et ses deux frères auront-ils droit de garder les deux autres tiers que leur père n'aurait pas eu le droit de retenir ?

Supposons encore un autre cas bien possible, celui de la défaillance de tous les enfants du dit George Platt, moins un ; ou cette défaillance a eu lieu dès avant la mort du dit George Platt, ou elle n'a eu lieu qu'après sa mort. Dans l'un et l'autre événement, ce seul enfant survivant du dit George Platt recueille la terre de la côte à Barron ; il ne doit alors rien avoir dans les deux maisons d'après la 10<sup>e</sup> clause. A qui sera dévolue la propriété de ces deux maisons ? Aux parents collatéraux du testateur ? Il n'est pas à supposer, il n'est pas même raisonnable de dire que le testateur ait eu l'intention que ces deux maisons passassent à des collatéraux, lorsqu'il y aurait encore des descendants de lui le testateur. Cependant c'est là où nous conduirait le système de l'intimé, si le dit George Platt, à son décès, n'eût laissé pour descendants qu'un seul enfant.

Je pourrais encore présenter d'autres hypothèses au moyen desquelles il serait facile de faire voir qu'en admettant le système de l'intimé, la 10<sup>e</sup> clause en rétroagissant sur la 8<sup>e</sup>, comme elle doit nécessairement le faire dans ce système, plus ou moins selon les circonstances, introduirait

la confusion dans les arrangements de famille que le testateur a prescrits, et opérerait contrairement à ses intentions et à des volontés évidentes. En donnant la terre à l'un de ses petits enfants, et les deux maisons aux autres, c'est un partage que le testateur a fait d'avance entre eux pour le cas de l'ouverture de la substitution, ouverture qui dépendait de la mort de son fils, si celui-ci venait à recueillir. Les enfants de ce dernier étaient, entre eux, appelés par substitution directe ou vulgaire à recueillir la terre. Chacun d'eux devait recueillir en propriété la portion des biens qui devait lui revenir, à la mort de George Platt, quelque fût cette portion, la substitution étant alors consommée.

Il ne me reste plus qu'une question à examiner. Le testateur a dit : " au fils aîné du dit George Platt et à ses *hoirs*" et non pas ses *enfants*. Le mot *hoirs*, dans ce cas, constitue-t-il un fidéicomis ? Quelques auteurs soutiennent l'affirmative. Je ne puis me ranger de leur avis. Je crois mieux fondée et plus raisonnable l'opinion des auteurs qui, comme Pothier (1), disent que, " lorsqu'on donne et lègue quelque chose à quelqu'un, et à ses *hoirs*, ces termes, et à ses *hoirs*, n'expriment aucune substitution, ils sont de pur style et n'ont aucun effet. Ils ne signifient autre chose, sinon qu'on donne un droit perpétuel de propriété que le donataire ou légataire transmettra dans sa succession." Remarquez que par ces termes généraux, et à ses *hoirs*, l'ordre des successions n'est pas interverti. Bourjon, t. 2, éd. de 1770, p. 165, tit. 5, des Subrogations, sec. 7, dit : " la donation qui est faite tant au donataire qu'à ses *hoirs ou héritiers*, n'emporte pas substitution en faveur des héritiers qui n'ont droit à la chose qu'autant qu'ils la trouvent dans la succession du donataire ; cette mention, dans la donation, des héritiers, n'est qu'une expression de droit commun, qui ne peut changer la nature de la donation, qui a fait passer la propriété de la chose donnée dans la personne du donataire, qui a été l'objet de la li-

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(1) *Substitutions*, p. 498.

“ béralité dont les enfants ne peuvent profiter que du chef  
“ du premier.”

La Cour.... 1. Considérant que, lorsqu'au décès de son père, George Platt, dont il était alors le fils aîné, l'appelant a recueilli, en vertu du testament de son ayeul paternel, l'immeuble situé à la côte à Barron, et dont le terrain par lui vendu à l'intimé faisait partie, il a ainsi recueilli le dit immeuble en pleine propriété et non à charge de substitution; 2. Considérant, par conséquent, que dans le jugement dont est appel, il y a mal jugé en ce qu'il déclare que l'appelant est grevé de substitution, et partant déboute l'appelant de son action, et déclare nul l'acte de vente par lui fait à l'intimé : Infirme le dit jugement; (1) et cette Cour procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, condamne le défendeur intimé à payer à l'appelant, pour les causes énoncées dans sa déclaration, la somme de £500 avec intérêt et dépens.

(L'hon. M. le juge Aylwin *dissentiente*.)

BARNARD, pour l'appelant.

LAFLAMME et LAFLAMME, pour l'intimé.

CHERRIER, DORION et DORION, conseils pour l'intimé.

(1) Jugement rendu par la Cour Supérieure à Montréal 30 avril 1858, présent : Smith, Juge.

The Court.... Considering that the said defendant hath fully established by legal and sufficient evidence, that at the time of the sale by the said plaintiff to the defendant of the lot of land mentioned in the declaration, the said plaintiff was not the absolute owner and proprietor thereof, but that the said lot of land as forming part of a larger lot or piece of ground mentioned in the said declaration, was held and possessed by the said plaintiff under the provisions of the last will and testament of the late John Platt, the grand father of the said plaintiff; and considering that by the terms and limitations of the said last will and testament of the said late John Platt.... the said plaintiff was *grevé de substitution* only of the said property so held by him, to and in favor of the several persons called by the said John Platt to take by succession the said piece of land in the order in which the said persons are appointed to take under the limitations of the said last will; and considering that in law, the said last will and testament imports a *substitution* in the manner and form as the same is created by the terms of the said last will and testament, and that by reason thereof the said plaintiff could not by law alienate the said piece of ground as the absolute owner and proprietor thereof; and further considering that by the terms and stipulations of the said deed of sale, on which the action of the said plaintiff rests, the said sale should be absolutely null and void, if a substitution of the said property should be declared to exist, *et une substitution se déclarait*, the Court doth maintain the exception pleaded by the said defendant to the present action, and doth annul and make void the said deed of sale agreeably to the terms and stipulations of the said deed, and doth dismiss this action with costs.

**BANC DE LA REINE, } DISTRICT DE MONTRÉAL.  
EN APPEL.**

Présents :—Sir L. H. LAFontaine, Baronnet, Juge-en-Chef,  
AYLWIN, DUVAL et CARON, Juges.

BURROUGHS, ..... *Appelant.*

et

MOLSON *et al.*, ..... *Intimés.*

Jugé :—Que, dans l'espèce, la substitution d'un procureur pour l'appelant au lieu et place de celui qui le représentait avant, a eu l'effet d'un acquiescement aux procédés du premier procureur, faute d'un désaveu, et ce nonobstant les irrégularités qui pouvaient se rencontrer dans ces procédés.

Held :—That, under the circumstances of the case, the substitution of an attorney for the appellant in lieu of the one who previously represented him, is an acquiescence of all the proceedings of the first attorney, there being no *désaveu*, and this notwithstanding any irregularity in the said proceedings.

Jugement rendu le 3me septembre 1858.

Sir L. H. LAFontaine, Brt. Juge-en-Chef.—Les conclusions de la demande avaient pour objet de faire rescinder et annuler deux actes notariés intervenus entre les parties, et, de plus, de faire condamner le défendeur à payer aux demandeurs, intimés, la somme de £2667 0 7, avec intérêt sur £2119 14 1, à compter du 25 Oct. 1855, et sur £500, à compter de l'assignation.

La déclaration est datée du 7 juillet 1856 ; le *præcipe* du 14, et le bref de sommation du 17. Le rapport à la Cour était fixé au 1er septembre suivant. L'assignation fut donnée au défendeur personnellement le 15 août.

Le *præcipe* est signé "Abbott et Baker, procureurs des demandeurs," et il se trouve encore dans cet état au dossier. L'original de la déclaration avait d'abord été signé de la même manière, mais ensuite la signature "Abbott et Baker" fut raturée et celle de "J. C. Baker" substituée. Quant à la copie de la déclaration qui a été signifiée au défendeur le 15 août 1856, il nous dit lui-même dans son factum qu'elle était seulement signée "J. C. Baker,"

en ajoutant que la rature de la signature "Abbott et Baker" sur l'original doit probablement avoir été faite entre le 14 juillet et le 1er septembre, et probablement avant le 15 août 1856. Ainsi au jour du rapport, le 1er septembre 1856, l'original de la déclaration ne portait que la signature "J. C. Baker," comme procureur des demandeurs.

Le défendeur n'ayant pas comparu défaut est régulièrement enregistré contre lui le 3 septembre 1856. Les choses en restent là jusqu'au 3 avril 1857, jour auquel sont produits au greffe une comparution pour le défendeur et une confession de jugement de sa part. Ces deux actes sont datés du 1er septembre 1856. C'est M. "J. J. C. Abbott" qui comparait pour le défendeur, après un *reçu avis* en la manière ordinaire signé de "J. C. Baker, procureur des demandeurs."

La confession de jugement est signée par le défendeur lui-même et contresignée par le dit "J. J. C. Abbott," comme son procureur *ad litem*. Elle est acceptée par les demandeurs, par le ministère de leur procureur, le dit "J. C. Baker," et cette acceptation porte, comme la confession elle-même, la date du 1er septembre 1856. Quoique la date de la comparution et de la confession soit antérieure de plusieurs mois à leur production au greffe, cela est sans importance. Au reste, le défendeur, en apposant sa signature sur la confession sous la date du 1er septembre y a donné son approbation. La confession est en ces termes :

" The defendant confesses judgment in favor of the plaintiffs for the sum of two thousand one hundred and ninety nine pounds, one shilling and sixpence, current money of the province of Canada, with interest thereon from the sixteenth day of August last past, and costs, as mentioned in the plaintiffs' declaration in this cause filed, and also confesses judgment in favor of the said plaintiffs, in so far as they pray for the rescision of the deed of sale and the annulling of the deed of discharge, in the terms of the

"said plaintiffs' conclusions, and these presents having  
"been read to him he hath signed."

"Montreal, 1st. September, 1856."

"CHS. S. BURROUGHS".

"J. J. C. ABBOTT,"

"*Atty. for Deft.*"

"I accept the above confession of judgment."

"Montreal, 1st. September, 1856."

"J. C. BAKER,"

"*for Pliffs.*"

And Endorsed.

"Filed the third day of April, 1857, at 10 minutes to  
4 P. M."

"M. C. P."

Le même jour de la production, 3 avril 1857, la cause est inscrite au rôle de droit par "J. C. Baker, procureur des demandeurs," pour jugement sur la confession du défendeur, et l'inscription porte un *reçu avis* signé de J. J. C. Abbott, comme procureur du défendeur. Aussitôt le greffier rédige le jugement suivant, qui porte la date du 3 avril 1857, et est signé de "J. C. Baker, procureur des demandeurs."

"The Defendant having filed an appearance in the office  
"of the prothonotary of this Court, and having also filed a  
"confession of judgment, by which said confession the de-  
"fendant confesses judgment in favor of the *plaintiffs*, for the  
"sum of two thousand one hundred and ninety-nine pounds,  
"one shilling and six pence, current money of the province  
"of Canada, with interest thereon, from the sixteenth day  
"of August last past, to wit, August, one thousand eight  
"hundred and fifty-six, and costs, as mentioned in the  
"plaintiffs' declaration in this cause filed, and also for the

" rescision of the deed of sale, and the annulment of the  
 " deed of discharge in the terms of the said plaintiffs' con-  
 " clusions; the *plaintiffs* having accepted the said confession  
 " of judgment and having inscribed this cause for judgment  
 " upon the said confession in conformity to the eighty-third  
 " section of the provincial statute, twelfth Victoria, chapter  
 " thirty-eight, the defendant is in consequence condemned  
 " to pay to the plaintiffs the said sum of two thousand one  
 " hundred and ninety-nine pounds, one shilling and six  
 " pence, current money aforesaid, with interest thereon  
 " from the sixteenth day of August last past, and the said  
 " deed of sale, to wit, a certain deed of sale from the said  
 " defendant to the said plaintiff Alexander Molson, made,  
 " bearing date and executed the thirtieth day of October,  
 " one thousand eight hundred and fifty-five, before Mtre.  
 " Easton and his colleague, notaries public, at Montreal  
 " aforesaid, is rescinded, annulled and set aside; and the  
 " said deed of discharge, to wit, a certain deed of dis-  
 " charge made, bearing date and executed at Montreal  
 " aforesaid, the twenty-fifth day of October, one thousand  
 " eight hundred and fifty-five, is also rescinded, annulled  
 " and set aside as being made without consideration, and  
 " the defendant is further condemned to pay the costs of  
 " this action, *distriction* whereof is granted to Joel C.  
 " Baker, esquire, the plaintiffs' attorney."

" J. C. BAKER,"  
*Atty. for Plffs*"

Voici la disposition de l'acte de judicature de 1849,  
 ch. 38, sous l'autorité de laquelle ces procédés ont eu lieu :  
 section 83. " Toute partie qui voudra confesser jugement  
 dans toute cause, soit dans la Cour Supérieure, soit dans  
 la Cour de Circuit, excepté dans les causes non suscep-  
 tibles d'appel de cette dernière Cour, *produira sa comparu-  
 tion* dans cette cause, et pourra ensuite *produire une confes-  
 sion de jugement par écrit signée de lui* (ou d'un procureur  
 spécialement autorisé à ce faire par un acte authentique



qui sera produit en même temps), et contresignée par son procureur *ad litem*, et si le demandeur accepte la dite confession, il pourra de suite inscrire la cause pour jugement sur la confession, et le protonotaire ou greffier rédigera le jugement en conséquence, lequel, *étant signé par le demandeur, ou par son procureur ad litem*, sera considéré comme étant le jugement de la Cour, et sera enregistré et exécuté en conséquence, et dans les causes de la Cour de Circuit non susceptibles d'appel, il sera permis de confesser jugement de vive voix en pleine Cour."

Le 17 avril 1857, nous voyons au dossier la motion suivante : " Motion on the part of the said defendant, Charles S. Burroughs, that for the causes expressed in the affidavit hereto annexed, he be permitted to appear by the undersigned, his attorneys, *in the room of John J. C. Abbott, esquire*, in order that he may have an opportunity of urging his pretensions as set forth in the said affidavit." (Signed) " Cross and Bancroft, for defendant."

" I consent."

J. J. C. ABBOTT,  
*Atty. for Deft.*

J. C. BAKER,  
*Atty. for Plffs.*

Cette motion est de suite accordée, et il est à remarquer que l'affidavit dont il y est fait mention, n'y a jamais été annexé, ni produit dans la cause, de l'aveu même du défendeur, appelant, en son factum.

Les choses paraissent en être resté là jusqu'au 17 mars 1858, jour auquel les nouveaux procureurs du défendeur, Messrs. Cross et Bancroft, présentent, après en avoir fait, le 15, signifier avis à MM. " Abbott et Baker " comme " procureurs des demandeurs," la motion suivante :

" That the paper writing purporting to be a confession of judgment by the defendant, and filed in this cause on the

“ third day of April, 1857, and all proceedings subsequent thereto, and more especially the paper writing filed of record in this cause, and purporting to be the judgment, or draft of judgment, drawn up by the prothonotary of this Court upon the said pretended confession of judgment, be, by this Honorable Court, set aside and declared to be wholly irregular, illegal, null and void, and of no effect whatsoever, and be rejected from the record of proceedings had in this cause, and that the said pretended judgment be, by this Honorable Court, held not to be a judgment of this Court, and the entry thereof in the plunitif of this Court be ordered to be, and be, struck out and erased from such plunitif; and that the said prothonotary be by this Honorable Court ordered and enjoined not to record the said pretended judgment in the registers of this Court, or otherwise to execute the same.”

Plusieurs raisons sont assignées à l'appui de cette motion; et comme on a semblé craindre qu'il pût arriver que la Cour de première instance ne reconnût aucune validité à cette motion, on a cru devoir suppléer au manque de force intrinsèque des raisons par leur nombre. En effet il n'y en a pas moins de quinze, ce qui atteste un certain talent d'amplification. Dans le fait, toutes ces raisons peuvent se réduire à une seule, c'est celle-ci : Le nom de “ Abbott ” se trouvant sur le *præcipe* du 14 juillet 1856, avec celui de “ Baker,” la comparution subséquente de M. Abbott en qualité de procureur du défendeur est radicalement nulle, ainsi que tous les actes de procédure qu'il a pu faire ensuite en cette qualité. Il y a deux membres du barreau du nom d'Abbott, et il n'est pas établi que le M. Abbott du *præcipe* soit celui de la comparution. Mais admettant pour un moment que ce soit le même, je ne vois pas comment, dans l'état de la cause, cette circonstance puisse autoriser le défendeur à venir à la onzième heure attaquer de nullité toute une procédure qui a reçu son acquiescement formel. La déclaration qui contient la demande signifiée au défendeur n'est pas signée de M. Abbott. Avant de confesser juge-

ment, le défendeur était obligé de comparaître ; puis sa confession de jugement devait être contresignée de son procureur *ad litem*. Cette formalité est établie pour la protection du greffier qui peut ne pas connaître la partie qui se présente à lui pour confesser jugement. Le procureur *ad litem* qu'il connaît se rend envers lui, par son contreseing sur la confession, garant de l'identité de cette partie. Le défendeur, en signant cette confession de jugement, et en la faisant contresigner par M. Abbott, comme son procureur *ad litem*, reconnaissait donc par là même qu'il l'avait chargé de comparaître pour lui dans sa cause ; il reconnaissait donc la validité de son acte de comparution fait au même instant que la confession ; il approuvait et ratifiait donc cet acte. La motion de substitution de procureur du 17 avril 1857, faite après la production de la confession de jugement, et après le jugement enregistré, comportait encore de la part du défendeur une nouvelle reconnaissance que M. Abbott avait été son procureur *ad litem* dûment constitué. Ainsi, si l'apposition du nom de M. Abbott sur le *præcipe* présentait quelque irrégularité, cette irrégularité faible et insignifiante était couverte par les actes du défendeur lui-même qui renonçait par là en pleine connaissance de cause à s'en prévaloir.

Du reste, si le défendeur se croyait être dans une position à pouvoir désavouer M. Abbott, il avait dans ce cas à adopter une autre procédure que celle qu'il a suivie.

Je suis donc d'opinion que l'intimé doit être débouté de son appel, et les jugements rendus en Cour de première instance confirmés.

Le jugement est confirmé, " considering that there is no " error in the judgment appealed from."

HEMMING et LUNN, pour l'appelant.

DORMAN, pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.  
 APPEAL SIDE.

Before :—Sir L. H. LaFontaine, Baronet, Chief-Justice,  
 Aylwin, Duval and Caron, Justices.

DOUGLAS, ..... *Appellant.*

and

DINNING, ..... *Respondent.*

Held :—That in cases of demands for letters of ratification, the action en garantie lies to remove oppositions, unless an express stipulation to the contrary be inserted in the deed of sale.

Jugé :—Que dans les procédures pour jugement de ratification, l'action en garantie a lieu pour faire disparaître les oppositions, à moins que le contrat de vente ne contienne une stipulation expresse au contraire.

Judgment rendered the 13th. September, 1858.

On the 22nd October, 1855, the appellant sold to the respondent, a certain property known as *Mount Lilac*, for the sum of £3,500. On the 13th. February following, the respondent sold a portion of the above property to John H. Galbraith for the sum of £2,900. It was agreed by the deed of sale between the respondent and Galbraith, that Galbraith should immediately sue for a ratification of his deed of purchase, and should prosecute the same with due diligence, and that if any opposition should be made against the said ratification by or through the vendor, or his *auteurs*, he, the vendor, should be bound to cause the same to be removed at his own costs, and with all diligence and despatch, and that payment of the purchase money should be deferred till the rendering of the judgment of ratification. Galbraith immediately took proceedings to obtain a judgment of ratification, when two oppositions were filed;—one at the instance of G. B. Hall *et ux*, for *lods et ventes*, alleged to be due for sales of portions of the said property prior to the sale by the appellant to the respondent, and also for the said sale to the respondent;—the other was filed by James Jeffrey, founded upon a bond, and to secure which the appellant had specially mortgaged the property in question to Jeffrey. The appellant also moved the Court

for permission and obtained leave to file an opposition *afin de conserver*, but without *hypothèque* or *privilège de bailleur de fonds*, inasmuch as he had omitted to file it within the delay fixed by law. The respondent then petitioned the Court for leave to intervene as the *garant formel* of the petitioner Galbraith, and for the purpose of suing the appellant *en garantie* by reason of the said oppositions, which leave was granted, and the appellant was brought into the case by writ of summons as defendant *en garantie*. The appellant allowed the respondent to proceed in the action *en garantie, ex parte*, when the Superior Court sitting at Quebec, on the 8th. March last, rendered judgment, maintaining the action *en garantie*, and condemning the appellant to intervene and put an end to the oppositions, and to take up the *fait et cause* of both the respondent and Galbraith, and in default thereof, to warrant, indemnify and bear them harmless from and against the said oppositions, such oppositions constituting, in law, a trouble, *trouble légal*, to the petitioner Galbraith. It was from this judgment that the present appeal was instituted.

Bossé, for the appellant, contended, that the judgment of the Court below was erroneous inasmuch as it was based upon the principle that the two oppositions of Jeffrey and Hall constituted a legal trouble to the possession of the property by Galbraith, and that he had a right to proceed against Dinning, his vendor, *en garantie*, to compel him to remove the oppositions in question, and that Dinning had therefore the right to intervene in the case. That this principle was erroneous, inasmuch as the oppositions did not constitute a legal trouble to the possession of Galbraith; that a legal trouble was clearly defined by *Pothier, Contrat de Vente*, no. 102, to be, "*La demande que donne contre l'acheteur un tiers qui prétend avoir un droit existant, dès le temps du contrat de vente, de se faire délaisser l'héritage;*" That in the present instance, therefore, there was no legal trouble, inasmuch as there was no question of Galbraith's right of possession; that the opposants set up no such

pretension, and did not desire to remove him from the possession of the property ; that it was perfectly optional with Galbraith, under these oppositions, either to deposit the amount of his purchase money, or to take no action in the matter whatever ; that in the event of his adopting the former course, he would obtain his judgment of ratification, and the creditors would have to arrange among themselves as to the order of collocation, a circumstance with which Galbraith would have nothing whatever to do ; if on the other hand, he should pursue the latter course and not deposit the money, he would be able, nevertheless, to obtain his ratification, subject to the oppositions, according to the terms of the statute, and the opposants in the cause would have nothing in either case to complain of. That these two oppositions therefore could not be considered as a legal trouble (*trouble légal*) to the possession of Galbraith, inasmuch as they made no claim whatever to the question of property, and did not consequently prevent him from obtaining his judgment of ratification ; and that therefore this legal trouble assigned as one of the reasons of the judgment appealed from, did not exist. (1)

That Dinning, particularly, could have no ground of complaint that Galbraith could not obtain what he sought, because it was he, Dinning, who had caused the oppositions in question to be filed, thereby compelling the creditors to make known their *hypothèques* ; and he could not, therefore, come into Court, and before Galbraith had decided whether he would deposit, or take his judgment of ratification subject to the oppositions, officiously complain that Galbraith was subject to a *trouble* of which Galbraith himself did not complain, and ask for him that which perhaps he did not want ; that the present action *en garantie* was therefore, to say the least, premature, even supposing it could hereafter be maintained ; but that the appellant went even further and maintained that Galbraith could not maintain an action

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(1) Guyot, Rep. vbo, Hypothèque, p. 671 :—Ib. vbo. Opposition, p. 435.

against Dinning. That the object of the statute 9, Geo. IV, cap. 20, in virtue of which judgments of ratification were obtained, as its preamble stated, was to lessen the expense of extinguishing secret incumbrances, and to reconcile the opposite interests of individuals; and for this purpose to oblige hypothecary creditors to declare and make known their mortgages to the purchaser, and to assure the latter that no other incumbrances existed; that this being the case, if the opinion of the Court below, that the petitioner for ratification could call in his vendor *en garantie*, and the latter and all preceding vendors in like manner call in their *garant*, were maintained, petitions for ratification of title, instead of diminishing expenses, would, on the contrary, give rise to a multitude of actions, increase expenses, and thus frustrate the object of the statute.

That the intervention had, moreover, been irregularly filed in the cause, so far as the appellant was concerned, because the respondent had never notified him of the permission granted to him to file it, and that the appellant was the only party in the cause who had received no notification of the permission thus granted.

STUART, ANDREW, counsel for appellant, supported the case for the appellant, and remarked that he had doubts as to whether the right of obtaining letters of ratification had not been repealed by implication by the registry act passed subsequently; and to shew that statutes could be repealed by implication, he referred to Sedgwick on Statutes and Constitutional Law pp. 124, 5, 6 and 129.

HOLT, for respondent, contended that none of the reasons urged on behalf of the appellant were sufficient to justify the disturbance or reversal of the judgment of the Court below; that it was difficult to understand how the appellant could regard as unjust or oppressive a judgment which merely required him to remove from the property which he had sold, incumbrances which he had himself created, and against which he had given an express guarantee; that

the appellant was not injured by Dinning's intervening in the cause, which he was compelled to do, inasmuch as Galbraith had refused to pay and had protested against him in consequence of the filing of the oppositions in question, and that therefore Dinning had intervened in order to protect himself. That as to the question of the oppositions not being a *trouble*, he did not consider it necessary to argue upon this point, inasmuch as it was perfectly clear that they were.

Sir L. H. LaFontaine, Bart. Juge-en-chef.—Le 22 octobre 1855, vente par l'appellant à l'intimé d'une terre située à Beauport, pour le prix de £3,500, et le 13 février 1856, vente d'une partie de la même terre par l'intimé au nommé John Henderson Galbraith pour le prix de £2,900, avec stipulation expresse de garantie "de toutes dettes, hypothèques et empêchements généralement quelconques," puis avec la stipulation suivante : "and with a view of discharging and clearing the said property from all secret charges and incumbrances, it is hereby specially agreed by and between the said parties, that the said John Henderson Galbraith shall immediately sue for a ratification of his present deed of purchase from the Superior Court of Lower-Canada, sitting at Quebec, and follow up the same with due diligence, and if any opposition should be made against the said ratification, by or through the vendor or his *auteurs*, he the said vendor shall be bound to cause the same to be removed, at his own costs and diligence, with all proper despatch, and that until such judgment of ratification shall have been rendered the said purchaser shall not be bound to pay any part of the price of the present sale."

Le 1er septembre 1856, Galbraith demanda des lettres de ratification. A cette demande deux oppositions furent présentées, l'une de la part de James Jeffrey pour la somme de £3,600, montant d'un cautionnement judiciaire donné le 7 janvier 1854, par l'appellant, conjointement avec le



nommé Breakey, et l'autre de la part de G. B. Hall et son épouse ; et l'appelant dit que le 3<sup>me</sup> du même mois, il demanda la permission de produire lui-même une opposition afin de conserver, mais sans réclamer d'hypothèque ni de privilège de bailleur de fonds, vu qu'il se présentait après le délai expiré, laquelle permission lui fut accordée.

L'intimé est ensuite intervenu dans la cause comme garant formel de Galbraith, aux fins de contester les dites oppositions, et aussi, pour poursuivre l'appelant et le mettre en cause comme son garant formel. Puis il intenta une action en garantie contre ce dernier, en lui dénonçant les oppositions des dits Jeffery et Hall.

L'appelant n'a pas contesté l'action, de manière qu'elle a été instruite et jugée *ex parte*. Ce jugement qui est en date du 8 mars 1858, condamne l'appelant à garantir et indemniser, etc., etc.

De ce jugement il a interjeté appel, prétendant qu'en pareil cas, c'est-à-dire en demande de lettres de ratification, il n'y a pas lieu à l'action en garantie ; on a été même jusqu'à dire de la part de l'appelant que l'ordonnance d'enregistrement avait eu l'effet d'abroger notre statut relatif aux lettres de ratification. Cette proposition, tout à fait nouvelle pour moi, et faite, je crois, pour la première fois, est tout à fait insoutenable, et ne peut, en aucune manière, souffrir la discussion. Loin d'être censé avoir été abrogé par l'ordonnance, le statut a toujours continué d'être mis en vigueur, et il est de plus reconnu l'être par le statut de 1851, ch. 60, sec. 2.

On a aussi dit qu'à Québec, sous l'empire de la loi des lettres de ratification, on n'avait accordé l'action en garantie à l'acheteur que dans le cas où il y avait eu stipulation expresse qu'il demanderait ces lettres. Et bien le requérant, Galbraith, se trouve dans ce cas, vis-à-vis de son vendeur Dinning, comme on peut voir par la clause de son acte d'acquisition ci-haut rapportée au long. Et as-

surément si l'action en garantie compétait à Galbraith contre Dinning, la même action devrait par contre-coup compéter à Dinning contre son propre vendeur l'appelant.

Je ne sais ce qui a pu être décidé à Québec ; mais je sais qu'à Montréal, l'on n'a jamais fait de difficulté, sur procédure pour lettres de ratification, d'accorder l'action en garantie. Dès l'année 1831, c'est-à-dire peu de temps après la promulgation du statut des lettres de ratification, j'ai moi-même intenté une action en garantie de la part de l'impétrant qui était troublé par une opposition à sa demande. L'action fut maintenue, et le vendeur condamné à garantir l'acquéreur par jugement du 19 octobre 1831, (1) et depuis ce temps là l'action en garantie, sur opposition à des lettres de ratification, a toujours été accueillie et maintenue.

L'on sait que les lettres de ratification ont pris la place de la formalité du *décret volontaire*, dans le but de mettre un acquéreur en état de faire purger les hypothèques d'une manière moins couteuse, et en même temps plus expéditive. C'est une formalité substituée à une autre. Pothier, dans son introduction au titre 21 de la Coutume d'Orléans, § 21, No. 170, dit : " Les oppositions afin de conserver, qu'on forme au décret volontaire, doivent pareillement (c'est-à-dire comme les oppositions afin de distraire et afin de charge) être dénoncées au vendeur qui en doit défendre l'acquéreur etc." Nous lisons, dans le Répertoire de Guyot, au mot "Hypothèque," p. 673, éd. de 1784 ; " L'opposition au sceau (des lettres de ratification) a l'effet de la demande en déclaration d'hypothèque, ou de l'action d'interruption."

Grenier, dans son Commentaire sur l'Edit de 1771, Ed. de 1787, p. 14, remarque, — " Le vendeur n'avait pas le temps de prendre des arrangements avec les créanciers opposants ; il était exposé à essayer des frais ruineux de procédure ou de consignation ; pour éviter cet inconvénient il a été rendu une déclaration, le 5 septembre 1783, enregistrée

(1) *Ex parte* Dieudonné Perrin, réquerant, Pepin, opposant et Perrin demandeur en garantie, vs. Simon Hogue, défendeur en garantie.

au parlement le 9 janvier 1784, qui porte, art. 2, que " l'acquéreur ne pourra former aucune demande contre son vendeur, soit afin de main levée des oppositions, soit afin d'être libéré du prix de son contrat, qu'après quarante jours de délai, à compter du jour du sceau des lettres de ratification." Cette déclaration est donnée en entier par Grenier, à la fin de son commentaire p. 515. On ne doutait donc pas que sous l'empire de l'Edit de 1771, l'acquéreur pût, en cas d'oppositions, se pourvoir contre son vendeur, et l'appeler en cause pour faire lever ces oppositions, ou en défendre le garanti. Grenier ajoute que le vendeur ne pouvait se mettre à l'abri de ce recours de la part de l'acquéreur que par une stipulation expresse. " On peut," dit-il, p. 28, " stipuler, par exemple, que l'acquéreur prenant des lettres ne pourra forcer le vendeur à faire cesser les oppositions, pour quelques causes qu'elles soient faites ; qu'il sera tenu de souffrir les droits des acquéreurs antérieurs, de payer les créanciers de rentes perpétuelles ou viagères, pour n'être lui-même que créancier, comme eux, de ces rentes, et sans pouvoir en retenir les capitaux sur le prix de son acquisition ; qu'il sera en un mot forcé de payer, nonobstant toutes oppositions, et sauf ses oppositions et ses droits, en cas de ventes postérieures."

Notre statut de 1829, a emprunté la plupart de ses dispositions à l'Edit de 1771. Il n'a rien changé des relations qui existent entre l'acheteur et le vendeur sur la garantie. Il laisse subsister le recours du premier, tel qu'il eut pû l'exercer en France sous l'Edit de 1771. Puisque là l'acquéreur eut en le droit, en cas d'oppositions à ses lettres de ratification, d'appeler son vendeur en cause, il s'ensuit qu'ici l'intimé était bien fondé à se pourvoir contre l'appellant, et que celui-ci est non-recevable à attaquer le jugement qui le condamne.

**BOSSÉ and CARON**, for appellant.

**HOLT and IRVINE**, for respondent.

**No. 2630.** { **SINJOHN,**..... *Plaintiff.*  
                  **vs.**  
                  **ROSS,**..... *Defendant.*  
                  **and**  
                  **CHRISTOPHERSON,**..... *Tiers-saisie.*

**Judgment rendered the 27th. September, 1858.**

**MEREDITH, Justice.**—It is now beyond doubt that the ordinance of 1629 (commonly called the code Marillac or code Michaud) was duly registered *au Parlement de Paris*; (2) but a question has been raised as to whether the prescription established by the 142nd. article of that ordinance ought to be deemed an absolute bar to the action, or merely a presumption of payment. The late Mr. Justice W. K. McCord in a judgment (3) in which all the leading

(3) 1 Rev. de Lég. p. 190.

authorities on the subject are cited, held that the prescription in question is an absolute bar. Mr. Justice Charles Mondelet in another case (1) in which the same question presented itself, after showing clearly that the provision of law under consideration is in force here, observed : “ Mais “ ici, la raison qui dicta l’ordonnance de 1510, établissant “ la prescription de cinq ans contre les rentes constituées, “ a une égale force au sujet des loyers, plus de force encore, afin, comme le dit le savant Troplong, de ne pas “ laisser écraser le débiteur par des loyers accumulés pendant un nombre d’années considérable ; ” but nevertheless that learned Judge, guided by the authorities which will be found cited in his judgment, came to the conclusion that the prescription in question is merely a *fin de non recevoir*, which must be accompanied by allegation of payment, and an offer of the defendant’s oath.

It is satisfactory, in this case, that the defendant having alleged payment and offered his oath, I am not under the necessity of choosing between the two contending opinions to which I have alluded ; but as my attention has been drawn to the question by the arguments of the learned Counsel, I think it right to observe, that I do not see how the ordinance can have the effect intended, namely : “ de ne pas “ laisser écraser le débiteur par des loyers accumulés pendant un nombre d’années considérable,” if a debtor is not to be allowed to avail himself of the prescription which it establishes without swearing that he has actually paid the rent with respect to which he pleads the prescription. But in this case that question does not arise,—and as the point submitted seems to be free of difficulty. I maintain the prescription as pleaded.

JONES and HEARN, for plaintiff.

ANDREWS, CAMPBELL and ANDREWS, for defendant.

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(1) 1 *Revue de Lég.*, p. 237.

## IN THE CIRCUIT COURT.—QUEBEC.

Before :—CHABOT, Justice.

No. 3083. { WADE,..... Plaintiff.  
                   vs.  
                   HUSSEY,..... Defendant.  
                   and  
                   HUSSEY,..... Opposant.

Held:—That the sword of a military man is exempt from seizure, as being part of his necessary military equipments.

Jugé:—Que l'épée d'un militaire est exempt de saisie, comme formant partie nécessaire de ses accoutrements

Judgment rendered the 25th. October, 1858.

The defendant in the cause, a Lieutenant in Her Majesty's 39th. Regt., by opposition *afin de distraire*, claimed a sword which had been seized by the plaintiff in virtue of the writ of execution issued in the cause, alleging that it was a part of his necessary military equipment and appointments, and, as such, was not liable to seizure for his personal debts.

AUSTIN, for opposant, maintained that the sword was exempt from seizure, inasmuch, as it was a part of the opposant's military uniform, and necessary for the discharge of his duties to the public service, and as such could not be seized. (1).

PLAMONDON, for plaintiff, contended that an officer's sword was liable to seizure, inasmuch as it was not provided for him at the public charge ; that in this particular it was essentially different from the case of an article of military equipment belonging to a non-commissioned officer, whose accoutrements were provided for him by the government, whereas in the case of commissioned officers, it was well known, and was specially admitted in this case, that they had to provide their uniform and accoutrements at their own expense, and pay for them out of their own private

(1) Pigeau, p. 611:—Guyot, Répertoire, vbo. Saisie-exécution.

means, and were not provided nor paid for by government, and therefore that the sword in question having been purchased by the opposant himself, though part of his uniform, was liable to seizure for his debts, inasmuch as it was personal property and belonged to him, and was not public property.

CHABOT, Justice.—The Court is of opinion that the opposition must be maintained. All the authorities are plain upon the subject. The ordonnance of 1639 explicitly declares it with respect to all gentlemen who carried swords at that period for the king's service; and by analogy this rule applies to officers in the army at the present day.

Opposition maintained.

AUSTIN, for opposant.

FLAMONDON and DESCHÈNE, for plaintiff.

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# AN INDEX

## OF THE

# PRINCIPAL MATTERS.

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### ACTION OF ACCOUNT,—PARTNERSHIP.

**Held:**—That when in a declaration in an action *pro socio* it is alleged that the plaintiffs have rendered an annual account of the portion of the partnership business under their control to the defendants, it is not necessary to offer and file with such declaration an account of the said portion of the partnership business; but it will be necessary to the maintenance of the action, to prove the allegation that an account has been rendered by the plaintiffs to the defendants.

**Jugé:**—Que quand il est allégué dans une action *pro socio* que les demandeurs ont annuellement rendu compte aux défendeurs de cette partie des affaires de la société qui était sous leur contrôle, il n'est pas nécessaire d'offrir et filer avec telle déclaration un compte de la dite partie des affaires de la société; mais pour pouvoir maintenir l'action, il sera nécessaire de prouver l'allégué que tel compte a été rendu par les demandeurs aux défendeurs.

*McDonald, et al, vs. Miller et al.*

214

### ACTION EN GARANTIE.—*Vide* RATIFICATION.

### ACTION POSSESSOIRE.—POSSESSION WITHOUT A DEFINITE TITLE.

**Held:**—That title deeds of property which do not describe its extent, cannot give or determine limits to acts of possession, but place the alleged possessor in virtue of such title deed, in the same position as if he had no title whatever.

**Jugé:**—Que des titres de propriété qui n'en indiquent pas l'étendue, ne peuvent déterminer les limites dans lesquelles l'on a fait des actes de possession, mais tels titres mettent le possesseur supposé de telle propriété, dans la même position que s'il n'avait pas de titre du tout.

*Naud dit Labrie et al vs. Clément dit Labonté.*

140

### ADVERTISEMENT BY SHERIFF.—*Vide* SEIZURE.

### AFFIDAVIT.—*Vide* ATTACHMENT.—REVENDECATION.

### AGENT, LIABILITY OF.—*Vide* ATTACHMENT.

### ARTICULATION DE FAITS.—*Vide* PLEADINGS.



## ASSESSORS, ACTION OF.—SALARY.—CORPORATION.—WITNESS.

Held:—1o. That assessors appointed under a Statute authorising the Corporation of Montreal to appoint such assessors, and to grant them such remuneration for their services as the Council may deem fitting, cannot recover on a *quantum meruit* in an action against the Corporation.

2o. That the right of a witness is to be taxed in the Court in which he is examined, and not to bring an action in another Court, on a *quantum meruit* for attendances and loss of time as such witness.

Jugé:—1o. Que des cotiseurs nommés en vertu d'un Statut autorisant la Corporation de la cité de Montréal de nommer tels cotiseurs, et de leur accorder telle rémunération pour leurs services que le Conseil jugera à propos, ne peuvent pas porter une action contre la Corporation pour un *quantum meruit* pour tels services.

2o. Que le droit d'un témoin est de se faire taxer par la Cour devant laquelle il est examiné, et non de porter une action devant une autre Cour, pour un *quantum meruit* pour comparutions et perte de temps comme témoin.

*Gorrie vs. The Mayor, Aldermen and Citizens of Montreal.* 236

## ASSIGNMENT.—FRAUD.—INSOLVENCY.

Held:—That in order to set aside a deed of assignment on the ground of fraud, the insolvency of the assignor must be alleged and proved.

*Bernier vs. Vachon et al.*

Jugé:—Que pour faire annuler un transport comme entaché de fraude, il faut alléguer et prouver l'insolvabilité du cédant.

286

*Seizure.*

Held:—1o. That the assignee of a debt is entitled to intervene on the seizure of the immoveable property of the debtor, made in the name of the assignor, before notification of the assignment for the benefit of the assignee; and also to be declared proprietor of the debt and *dominus litis* in the proceedings.

2o. That the assignor has no right to contest such a demand, nor to claim to be first reimbursed the costs by him incurred as well on the suit as upon the seizure.

3o. That, in the case submitted, the deed between the appellant and the respondent is an assignment which has made the appellant proprietor of the debt.

*Berthelet and Guy et al.*

Jugé:—1o. Qu'un cessionnaire d'une créance a droit d'intervenir sur la saisie immobilière faite au nom des cédants, avant la signification du transport pour le profit du cessionnaire; et aussi d'être déclaré propriétaire de la créance et maître de la procédure.

2o. Que les cédants sont mal fondés à contester semblable demande, et à prétendre au remboursement préalable des frais encourus tant sur l'action que sur la saisie.

3o. Que, dans l'espèce, l'acte intervenu entre l'appellant et les intimés est un transport qui a rendu l'appellant propriétaire de la créance.

305

ASSIGNMENT.—*Vide* INSURANCE, CONTRACT OF.—PARTNERSHIP.

## ATTACHMENT.—AGENT, LIABILITY OF.

Held:—That, in the case submitted, the defendant was liable in an action of damages, for having, in his capacity of agent or attorney of a third party, caused the illegal seizure of the plaintiff's property.

*Warren vs. Noad.*

Jugé:—Que, dans l'espèce, le défendeur était responsable en dommages, pour avoir, en sa qualité d'agent ou procureur d'une tierce personne, fait illégalement saisir la propriété du demandeur.

177

*Informer.*

Held:—That money payable by the revenue inspector for services performed by an informer, under the statute 14th. and 15th. Vic. Cap. 100, are not liable to seizure.

*Leclerc vs. Caron.*

Jugé:—Qu'une somme d'argent payable par l'inspecteur du revenu pour services rendus comme dénonciateur, sous l'acte de la 14me et 15me Vic., chap. 100, est insaisissable.

287

*Petition for.*

Held:—That, in the case submitted, the petition for attachment, under the provisions of the 12 Vic., cap. 42, s. 8, was sufficient and could not be dismissed on demurrer.

*Foster et al vs. Dorion et al.*

Jugé:—Que, dans l'espèce, la requête pour emprisonnement, en vertu des dispositions de la 12me Vic., ch. 42, sec. 8, était suffisante et ne pouvait être renvoyée sur défense au fonds en droit.

152

*Possession.*

Held:—That, in the case submitted, the respondents were in possession of the effects seized by the appellant, as of and belonging to the defendant, and that, therefore, the seizure effected under the writ of *saisie-arrest* issued in the cause was null and void.

*Tremblay and Noad et al.*

Jugé:—Que, dans l'espèce, les intimés étaient en possession des effets saisis par l'appelant comme appartenant au défendeur, et que, par conséquent, la saisie pratiquée en vertu du writ de *saisie-arrest* émané dans la cause était nulle.

340

*Saisie-arrest.—Affidavit.*

Held:—That an affidavit for *saisie-arrest* in which the word "*celer*" is used instead of the word "*receler*," and the latter word erased in the body of the affidavit, and the former put in the margin, and not referred to in the jurat, is good.

*Bourassa vs. Haws.*

Jugé:—Qu'un affidavit pour *saisie-arrest* dans lequel l'on se sert du mot "*celer*" au lieu du mot "*receler*," et ce dernier mot biffé dans le corps de l'affidavit, et le premier mis en marge, sans mention du renvoi dans le jurat, est suffisant.

13

BAIL.—*Vide* SPECIAL BAIL.

BAILIFF.—*Vide* SEIZURE.

BETTERMENTS, CLAIM FOR.—SQUATTERS.—PRIMOGENITURE.—  
COMMON SOCCAGE.

Held:—1o. That a squatter who has made substantial improvements (*impenses utiles*) upon real property occupied by him, without the consent of the proprietor, is entitled to judgment against the proprietor for the excess of the value of such improvements beyond the rents, issues and profits, and to retain possession of the real property till paid for his improvements.

2o. That the only legal mode of ascertaining the value of improvements and *fruits et revenus*, when the value of such ameliorations are claimed by the defendant in answer to a petitory action by the proprietor, is by an *expertise*.

3o. That the eldest son, as heir to his father, deceased intestate, is seized as proprietor of lands held in free and common soccage, by virtue of the right of primogeniture as one of the incidents of that tenure, and can maintain a petitory action for the recovery of such lands.

Jugé:—Qu'un *squatter* qui a fait des améliorations, impenses utiles, sur une propriété qu'il occupait sans le consentement du propriétaire, est en droit d'obtenir jugement contre tel propriétaire, pour le surplus de la valeur de telles améliorations, au-delà de la valeur des fruits et revenus de la propriété, et de retenir la possession de telle propriété jusqu'à ce qu'il ait été payé de ces améliorations.

2o. Que le seul moyen légal de constater la valeur des améliorations et des fruits et revenus, quand telles améliorations sont réclamées par un défendeur en réponse à une action pétitoire de la part du propriétaire, est par une *expertise*.

3o. Que le fils aîné, comme héritier de son père, décédé *ab intestat*, devient propriétaire à titre d'hérédité de terres tenues en franc et commun socage, et ce en vertu du droit d'aînesse, lequel est un des incidents de cette tenure, et peut maintenir une action pétitoire pour le recouvrement de telles terres.

*Stuart vs. Eaton.*

113

BORNAGE.

Held:—That in an action *en bornage* the defendant cannot be condemned to compel his neighbours to *borner* with him, and an allegation with conclusions to that effect will be held bad on demurrer.

Jugé:—Que dans une action *en bornage* le défendeur ne peut être condamné à contraindre ses voisins à borner avec lui, et un allégué et des conclusions à cet effet seront renvoyés sur défense au fonds en droit.

*Fradei vs. Labrecque.*

218

BUILDING SOCIETIES.—CORPORATIONS, LEGAL EXISTENCE OF.

Held:—1o. That a declaration filed in pursuance of the 12th. Vic., c. 57, sec. 1, which the parties signed, but to which they omitted to affix their seals, is nevertheless sufficient, and answers the object of the statute,—that of making known the names of the persons originally composing the society.

Jugé:—1o. Qu'une déclaration filée en conformité à la 12me. Vic., ch. 57, sec. 1, signée des parties, mais à laquelle il n'a pas été apposé de sceau, est néanmoins suffisante, et répond à l'objet du statut,—qui est de faire connaître les noms des personnes qui ont d'abord composé la société.

20. That the legal existence of a corporation cannot be questioned by an incidental proceeding, such as a plea in a cause, but must be attacked by means of proceedings under the 12th., Vic. ch. 41.

20. Que l'existence légale d'une corporation ne peut être révoquée en doute par une procédure incidente, telle qu'une exception, mais doit être attaquée au moyen d'une procédure en vertu de la 12me. Vic., ch. 41.

*The Union Building Society vs. Russell.*

276

CERTIORARI.—*Vide* CONVICTION.

COMMON CARRIER.—STEAMER.

Held:—That a carrier who undertakes to convey goods from Quebec to Chicago, with power to tranship at Kingston, complies with the usage of that port, by transshipping from a steamer into a sailing craft, and is therefore not responsible for the loss of such goods occasioned by tempestuous weather in which such sailing craft was wrecked.

Jugé:—Qu'un commissionnaire qui entreprend de transporter des marchandises de Québec à Chicago, avec le droit d'en faire le transbordement à Kingston, se conforme à l'usage de ce port, en transbordant les effets d'un vapeur sur un vaisseau à voile, et par conséquent n'est pas responsable de la perte de telles marchandises occasionnée par le mauvais temps et le naufrage de tel vaisseau à voile.

*Warren vs. Henderson.*

108

COMMON SOCCAGE.—*Vide* BETTERMENTS, CLAIM FOR.

COMMUNAUTÉ.—*Vide* MARRIAGE.

COMPENSATION.—INDICATION DE PAIEMENT.—REGISTRATION.

Held:—That an action by the party indicated in a deed of sale as the person to whom the *prix de vente* of an immoveable shall be paid, will be dismissed upon plea of compensation by the defendant, as holder of notes previously made by the vendor, the *indication de paiement* not having been accepted by the plaintiff; and that the registration of the deed by the plaintiff does not affect the defendant's rights in such a case.

Jugé:—Qu'une action par une personne indiquée dans un contrat de vente comme celle à laquelle le prix de vente d'un immeuble sera payé, sera renvoyée sur plaidoyer de compensation par le défendeur, en possession de billets promissoires faits par le vendeur, l'indication de paiement n'ayant pas été acceptée par le demandeur; et que l'enregistrement de l'acte de vente par le demandeur n'affecte pas les droits du défendeur en pareil cas.

*Seaver et al vs. Nye.*

221

CONVICTION.—CERTIORARI.

Held:—That a conviction by the Recorder of the city of Montreal for a penalty for constructing a wooden building within the city limits, contrary to a By-Law of the Corporation, will be quashed, no notes of

Jugé:—Qu'une conviction par le Recorder de la cité de Montréal, pour une pénalité pour avoir érigé une bâtisse en bois dans les limites de la dite cité, en contravention à un règlement de la Corporation, sera

evidence having been transmitted to the Court above to shew whether the applicant fell within the provisions of the By-Law as being a *proprietor*, or whether, as sworn to in his affidavit, he was merely a *workman* employed by the proprietor.

annulée, *quashed*, aucunes notes du témoignage n'ayant été transmises au tribunal supérieur pour constater que le requérant tombait sous l'opération du règlement, comme propriétaire, ou si, tel qu'allegué dans son affidavit, il était seulement un ouvrier employé par le propriétaire.

*Ex parte, Ledoux.*

255

**COSTS.—***Vide* MORTGAGE.—PEREMPTION D'INSTANCE.

**CORPORATION.—***Vide* ASSESSORS.

**CORPORATIONS, LEGAL EXISTENCE OF.—***Vide* BUILDING SOCIETIES.

**CORPORATION, LIABILITY OF.—**DAMAGES.

Held:—That the Corporation of the city of Montreal is not liable in damages to a person falling into the cellar of a house burned down, and not rebuilt, the lot being uninclosed, contrary to the By-Law of the Corporation; the cause of such damages being too remote.

Jugé:—Que la Corporation de la cité de Montréal n'est pas responsable en dommages envers une personne qui a tombé dans la cave d'une maison brûlée, qui n'avait pas été reconstruite et dont l'emplacement, nonobstant le règlement de la Corporation à cet effet, n'était pas enclos; la cause de tels dommages étant trop éloignée.

*Bélanger et ux vs. The Mayor, Aldermen and Citizens of the City of Montreal.*

228

*Promissory note.*

Held:—1o. That a corporation duly constituted in a foreign country may proceed for the recovery of its debts in Lower Canada.

Jugé:—1o. Qu'une corporation établie en pays étrangers peut poursuivre dans le Bas-Canada le recouvrement de ce qui lui est dû.

2o. That upon action brought for the recovery of the amount of a promissory note made for value received, the holder of such note need not prove that value was given.

2o. Que sur poursuite pour recouvrement du montant d'un billet fait pour valeur reçue, le porteur n'est pas obligé de prouver que telle valeur a été donnée.

*Larocque et al and The Franklin County Bank.*

328

**CORPORATION OF MONTREAL.—***Vide* EXPROPRIATION, PROCEEDINGS FOR.

**CRIMINAL INFORMATION.—**SLANDER.

Held:—1o. That in an application for criminal information for libel, the Court is placed in the position of a Grand Jury, and must have the same amount of information laid be-

Jugé:—1o. Que sur une application pour une information criminelle pour libelle, la Cour remplit les fonctions de grand jurés, et doit avoir pardevant elle des témoi-

fore it, as will warrant a Grand Jury in returning a True Bill.

20. That a Grand Jury would not be warranted in returning a True Bill for libel, unless the libel itself were laid before them.

30. That an application for a criminal information for libel must be rejected, unless the libel itself be filed with the affidavit upon which the application is founded.

*Ex parte, Gugsy.*

guages qui autoriseraient des grands jurés à rapporter un *true bill*.

20. Qu'un Grand Jury ne serait pas justifiable à rapporter un *true bill*, sans avoir par devant lui le libelle.

30. Qu'une application pour une information criminelle pour libelle sera rejetée, si le libelle n'est produit avec l'affidavit produit au soutien de telle application.

353

DAM.—*Vide* WATER POWER.

DAMAGES.—*Vide* CORPORATION; LIABILITY OF.

### DÉGUERPISSEMENT.

Held:—That a party who contracts to pay a ground rent for ever, *à perpétuité*, deprives himself of the power of making a *déguerpissement*.

20. That the stipulation, "*de payer la rente à toujours et à perpétuité*," is equivalent to the obligation, "*de fournir et faire valoir*."

*Hall and Dubois et al.*

Jugé:—Qu'il n'est pas loisible à un preneur a bail à rente foncière non rachetable, de se libérer du paiement de cette rente en déguerpissant l'immeuble.

20. Que la stipulation de payer la rente à toujours et à perpétuité, équivalant à l'obligation de fournir et faire valoir.

361

### DELIVERY.

Held:—That where three chains are attached together for the purpose of delivery, they compose one whole, and delivery of any one will not be held made, until all three shall have been delivered.

*McMaster and Walker et al.*

Jugé:—Que lorsque trois chaînes sont jointes ensemble pour être ainsi délivrées, ces chaînes n'en font qu'une, et que livraison ne sera censée complète, que lorsque les trois chaînes auront été délivrées.

171

DÉSAVEU.—*Vide* SUBSTITUTION OF ATTORNEY.

### DOMICIL.—ELECTION OF.—OPPOSITION.

Held:—10. That an opposition, made through the ministry of an attorney, will not be dismissed on the ground that it does not contain an election of domicile.

20. That the proper way to attack an opposition on the above ground, if objectionable, is by *exception à la forme*, and not by motion.

Jugé:—10. Qu'une opposition, faite par le ministère d'un procureur, ne sera pas renvoyée par la raison que telle opposition ne contient pas une élection de domicile.

20. Que le mode d'attaquer une opposition, pour la raison ci-dessus, en supposant la raison bonne, est par exception à la forme, et non par motion.

*Murphy vs. Moffatt, and Levy et al.*

477

DONATION.—*Vide* LEGITIME.—PLEADINGS.—REMISE.DOWER.—*Vide* LAWS OF ENGLAND.

## EJECTMENT.—SAISIE-GAGERIE.

Held:—That the proceedings for *Saisie Gagerie* and ejectment under the act 18 Vic., cap. 108, s. 16, cannot be maintained, unless founded on a lease, or on proof of the occupation by and with the consent and leave of the apparent proprietor.

Jugé:—Que la procédure en *Saisie Gagerie* et expulsion sous l'acte 18 Vic., ch. 108, sec. 16, ne peut avoir lieu, à moins qu'il n'apparaisse d'un bail quelconque, ou de l'occupation avec consentement et permission de celui qui est réputé propriétaire.

*Dubeau and Dubeau.*

217

## EMPHYTEOTE.

Held:—That immoveable property held by the lessee after the expiration of an emphyteotic lease, may be legally seized as belonging to the lessor to whom it must revert.

Jugé:—Qu'un immeuble détenu par un preneur emphytéote, après l'expiration du bail, peut être valablement saisi comme appartenant au bailleur auquel il doit revenir.

*Huet and Danais.*

235

## ENQUETES.—NOTICE OF ENQUETE.—JUDGMENT.

Held:—1o. That a foreclosed party is entitled to one *juridical* day's notice of the inscription *aux enquêtes*, under the 12 Vic., cap. 38, sec. 25.

Jugé:—1o. Que dans le cas de forclusion, la partie forclosée a droit à un jour d'avis d'inscription aux enquêtes, en vertu de la 12 Vic., ch. 38, sec. 25.

2o. That a judgment in an action *en réintégrande* which does not describe the property affected by the judgment, will be reversed in appeal, on the ground of vagueness.

2o. Qu'un jugement dans une action en réintégrande qui ne donne pas une désignation de la propriété affectée par le jugement, sera renversé sur appel, sur le principe que tel jugement est vague.

*Renaud and Gury.*

470

## EVIDENCE.—PARTNER.

Held:—In an action against a defendant as having been partner in a firm alleged to have been dissolved and insolvent, that the evidence of one partner is inadmissible to prove that the defendant was a member of the firm.

Jugé:—Dans une action contre un défendeur comme ayant été associé dans une société dissoute et insolvable, que le témoignage de l'un des associés pour prouver que le défendeur était un des membres de cette société est inadmissible.

*Chapman vs. Masson.*

225

EVIDENCE.—*Vide* INSURANCE, CONTRACT OF.—WRITTEN PROMISE.

## EXCEPTION A LA FORME.—PARISH,—NAME OF.

**Held:**—That an *exception à la forme*, setting forth that the defendant, described in the writ and declaration as *prêtre et curé* of the parish of *St. Jean Baptiste*, instead of *St. Jean-Baptiste de Rouville*, the name by which the parish was erected, is insufficient, the description in the writ not being shewn to be erroneous and false.

**Jugé:**—Qu'une exception à la forme, alléguant que le défendeur, qui est désigné dans le writ et la déclaration comme prêtre et curé de la paroisse de *St. Jean-Baptiste*, au lieu de *St. Jean-Baptiste de Rouville*, le nom sous lequel la paroisse a été érigée, est insuffisante, en autant que la désignation dans le writ n'est pas constatée être fautive et erronée.

*Gigon vs. Hotte.*

271

## EXPROPRIATION, PROCEEDINGS FOR.—VERDICT. CORPORATION OF MONTREAL.

**Held:**—1o. That on proceedings by the Corporation of Montreal for the taking of land for public use under the Provincial Statute of the 14th. and 15th. Vic., c. 128, secs. 66, 68 and 69, the justices of the peace could not refuse to swear, nor the jury to hear, the witnesses produced before them.

2o. That such refusal invalidated the verdict or assessment by the said Jury.

3o. That the *appearance and attendance* of the proprietor at the proceedings, had subsequently to such refusal, cannot be taken as a waiver of his right to complain of the illegal decision, there being no act of express acquiescence thereto.

4o. That, in the case submitted, recourse could be had to a direct action against the taking of the ground in question, by reason of the verdict being illegal and null.

**Jugé:**—1o. Que sur procédures par la corporation de Montréal à l'effet de prendre possession d'un terrain pour des objets d'utilité publique en vertu de l'acte de la 14<sup>me</sup> et 15<sup>me</sup> Vic., ch. 128, secs. 66, 68 et 69, les juges de paix ne pouvaient refuser d'asseoirer, et les jurés d'entendre, les témoins produits devant eux.

2o. Que tel refus a rendu nul le rapport ou l'estimation des dits jurés.

3o. Que la comparction et présence du propriétaire lors des procédures subséquentes à tel refus, ne peuvent être prises comme désistement du droit de se plaindre de la décision illégale, d'autant plus qu'il n'y a aucun acte exprès d'acquiescement à icelle.

4o. Que, dans l'espèce, l'on pouvait recourir à l'action directe contre la prise de possession du terrain en question, attendu la nullité et l'illégalité du rapport des jurés.

*Beaudry and The Mayor, Aldermen and Citizens of Montreal.* 104

FERRY.—*Vide* PARTNERSHIP.

FREE AND COMMON SOCCAGE.—*Vide* LAW OF ENGLAND.

FORECLOSURE.—*Vide* PLEADINGS.

FRAUD.—*Vide* ASSIGNMENT.



## HABEAS CORPUS.

Held:—That a writ of *Habeas Corpus* will not be granted in the case of a defendant confined in jail on civil process.

*Barber et al vs. O'Hara.*

Jugé:—Qu'un writ d'*Habeas Corpus* ne sera pas accordé dans le cas d'un défendeur détenu pour cause civile.

216

INDICATION DE PAIEMENT.—*Vide* COMPENSATION.

INDORSEMENT.—*Vide* PROMISSORY NOTE.

INFORMER.—*Vide* ATTACHMENT.

INIMITIÉ CAPITALE.—*Vide* RECUSATION.

INSOLVENCY.—*Vide* ASSIGNMENT.

INSURANCE, CONTRACT OF.—EVIDENCE.—ASSIGNMENT.

Held:—1o. That a contract of Insurance against fire may be made and proved without writing.

2o. That a transfer, although notarial, of a mortgage the subject of Insurance, does not destroy the insurable interest then existing, a *contre-lettre, sous seing privé*, from the transferee shewing that the transfer was nominal.

3o. That a clause in the acts constituting the charter of an incorporated Insurance Company, providing "that all policies of assurance whatever, made under the authority of this act or of the ordinance aforesaid, which shall be subscribed by any three directors of the said corporation, and countersigned by the secretary and manager, and shall be under the seal of the Corporation, shall be binding upon the Corporation, though not subscribed in the presence of a board of trustees, provided such policies be made and subscribed in conformity to a by-law of the Corporation," does not exclude other means of proving a contract of assurance consented to by them.

4o. That interest on the amount insured may be awarded from the day of the loss.

Jugé:—1o. Qu'un contrat d'assurance contre le feu peut être fait et prouvé sans écrit à cet effet.

2o. Qu'un transport, même notarié, d'une hypothèque en raison de laquelle on a effectué une assurance, ne détruit pas l'assurance existant alors, une contre-lettre du cessionnaire, sous seing privé, constatant que le transport n'était que nominal.

3o. Qu'une clause dans les actes incorporant une compagnie d'assurance qui statue "que toutes les polices d'assurance que ce soit, faites en vertu du présent acte ou de l'ordonnance susdite, qui seront signées par trois directeurs de la dite corporation, et contresignées par le secrétaire et les régisseurs, et revêtues du sceau de la dite corporation, obligeront la dite corporation, quoique non signées en présence du conseil des syndics, pourvu que ces polices soient faites et signées conformément aux règles et règlements de la dite corporation," n'empêche pas la preuve par d'autres moyens d'un contrat d'assurance consenti par telle compagnie.

4o. Que l'intérêt sur le montant de l'assurance peut être accordé à compter du jour de la perte.

*The Montreal Assurance Company and McGillivray.*

401

JUDGE.—*Vide* RECUSATION.

**JUDGMENT.—*Vide* ENQUÊTES.  
JURISDICTION.**

R, agreed verbally with H, at Nicolet, to tow his raft from Nicolet to Quebec, upon which H telegraphed to his agent in Quebec to instruct R's. agent in Quebec, to send up R's. steamboat from Quebec to perform the towage in question, which was done, and the raft towed to Quebec accordingly :

**Held :—**That this did not constitute a cause of action arising within the district of Quebec, so as to give the Superior Court there, jurisdiction to try the case, under the 12th Vic., c. 38, s. 14 ; that the cause of action means the *whole* cause of action, or all the circumstances connected with the transaction giving rise to the action.

*Rousseau vs. Hughes.*

**JUSTIFICATION.—*Vide* PLEADINGS.**

**LAWS OF ENGLAND.—TENURES ACT. DOWER. FREE AND COMMON SOCCAGE.**

**Held :—**1o. That before the British Act, 6 Geo. IV. cap. 59, commonly called the Canada Tenures Act, became law in Lower Canada, the customary dower of the Custom of Paris was claimable on lands in Lower Canada granted and held by the free and common soccage tenure.

2o. That by the above British Act, the law of England as to dower, descent and alienation, was introduced into Lower Canada, as an incident of the tenure of lands held in free and common soccage.

3o. That the defendant, Sophia Blodget, being married to Joseph Wilcox on the 31st January 1825, before the above act became law, while the said Joseph Wilcox was proprietor of lands in Lower Canada, held by the tenure of free and common soccage, was entitled to claim on the land in question her customary dower under the Custom of Paris.

*Wilcox et al and Wilcox.*

R, par convention verbale avec H, à Nicolet, s'engagea de remorquer un radeau de Nicolet à Québec, sur quoi H, par dépêche télégraphique, chargea son agent d'informer l'agent de R, à Québec, d'envoyer le vapeur de R, de Québec, afin de faire le service voulu, ce qui fut fait, et le radeau fut, en conséquence, amené à Québec :

**Jugé :—**Que cette convention ne donnait pas un droit d'action, originant dans le district de Québec, de manière à donner à la Cour Supérieure, dans ce district, juridiction dans l'instance, en vertu des dispositions de la 12e. Vic., ch. 38, sec. 14 ; que la cause d'action voulue par le statut est la cause d'action en entier, ou toutes les circonstances qui se rattachent à la transaction et qui font surgir le droit d'action.

187

**Jugé :—**1o. Qu'avant la passation de l'Acte Imperial, 6me. Geo. IV, ch. 59, communément appelé l'Acte des Tenures du Canada, le douaire coutumier de la Coutume de Paris, dans le Bas-Canada, s'appliquait aux terres tenues en franc et commun soccage dans cette Province.

2o. Que par le dit Acte Impérial les lois anglaises, quant au douaire, à l'hérédité, et à l'aliénation des biens, ont été introduites dans le Bas-Canada, comme incident de la tenure des terres en franc et commun soccage.

3o. Que la défenderesse, Sophia Blodget, s'étant mariée à Joseph Wilcox, le 31 janvier 1825, avant que le dit acte ne devint loi, et pendant que le dit Joseph Wilcox était le propriétaire de terres dans le Bas-Canada, tenues en franc et commun soccage, elle était en droit de réclamer sur telles terres le douaire coutumier de la Coutume de Paris.

34

LEGACY.—*Vide* SUBSTITUTION.

## LÉGITIME.—DONATEUR. WILL.

Held :—That a donation *inter vivos* cannot be subjected to reduction by reason of the *légitime*, if the donor has subsequently disposed of his estate by will.

Jugé :—Qu'une donation entre vifs ne peut être assujettie à la déduction de la légitime, si le donateur a plus tard disposé de ses biens par testament.

*Quintin dit Dubois et al and Girard et al.*

317

## LETTERS PATENT.

Held :—That in an action for infringement of Letters Patent for an Invention, it is sufficient to set out in the declaration the granting of the Letters Patent in favour of plaintiff, setting out also the date and tenor thereof, without alleging compliance with the formalities pointed out by the statute to entitle the plaintiff to obtain the Letters Patent.

Jugé :—Que dans une action pour infraction du droit résultant de Lettres Patentes, il est suffisant d'alléguer dans la déclaration, l'octroi des Lettres Patentes au profit du demandeur, ainsi que leur date et la teneur d'icelles, sans qu'il soit besoin d'alléguer que le demandeur s'est conformé aux dispositions du statut nécessaires à l'obtention des dites Lettres Patentes.

*Bernier vs Beliveau.*

297

LIBEL.—*Vide* CRIMINAL INFORMATION.LODS ET VENTES.—*Vide* MAINMORTE.LOYERS.—*Vide* PRESCRIPTION.

## MAINMORTE.—RAILWAY COMPANIES. LODS ET VENTES.

Held :—1o. That the mortmain restrictions upon the acquisition of real estate by mortmain corporations, were caused by the acquired property thereby becoming inalienable, not by the existence of the corporations being perpetual or continuous.

2o. That these restrictions applied to corporations aggregate, the clergy in general, religious bodies, fraternities, municipal guilds, and others of like nature, which form the class designated as mortmain corporations, *gens de mainmorte*.

3o. That modern civil corporations, established for commercial and trading purposes, as joint stock or incorporated banking, manufacturing, railway companies, &c., cannot be included in such class, nor do mortmain restrictions apply to them.

Jugé :—1o. Que les restrictions apportées à l'acquisition par les corporations en main-morte, ont pour cause la qualité d'inaliénable que prend la propriété acquise, et non la perpétuité ou continuité de telles corporations.

2o. Que ces restrictions s'appliquaient aux corps incorporés, le clergé en général, les communautés religieuses, les confréries, les municipalités, les corps de métiers, et autres semblables, composant la classe désignée sous le nom de *gens de main-morte*.

3o. Que les corporations civiles modernes, établies pour des objets de commerce et de trafic, telles que les compagnies à fonds communs, pour le fait de banque, manufacture, railroutes etc., ne peuvent tomber dans cette classe, et les restrictions de main-morte ne peuvent s'y appliquer.

40. That two or more such civil corporations may unite to form one incorporated company, without such union being in itself a sale, or equivalent thereto, and without subjecting the resulting company to liability for the payment of seigniorial or feudal dues.

50. That the deed of agreement set out in the plaintiff's declaration, was, in law, only in the nature of preparatory articles of union, not in itself a sale, or its equivalent, and not *translatif de propriété*, and in law could not and did not, by itself, establish the resulting company as a corporation.

60. That the defendant is not, in law, a mortmain corporation, nor subject to mortmain restrictions, and does not, in law, hold the lands in question in mortmain, as alleged in the plaintiff's declaration.

70. That the defendant, the existing Grand Trunk Railway Company of Canada, was incorporated by the 18th Vic. ch. 33, when the seigniorial act of 1854 was in existence, by which all seigniorial dues were abolished, and which relieved the defendant's acquisitions from all seigniorial dues.

80. That the sums of money claimed in this cause are not for arrears of seigniorial dues accrued to the plaintiff previous to the existence of the seigniorial act of 1854, the recovery whereof is provided for by that act.

90. That if the defendant were such mortmainor, *gens de main-morte*, and had acquired, as alleged, the realty in question previous to the legal operation of the seigniorial act of 1854, the declaratory provision of that act applies retrospectively to such acquisition, and relieves the defendant, as such mortmainor, from liability to the seigniorial *indemnité* claimed by the plaintiff for such acquisition made directly from another mortmainor.

40. Que deux ou plusieurs telles corporations civiles peuvent s'unir pour n'en former qu'une seule, sans que cette union puisse être considérée en elle-même comme vente, ou équipollente à vente, et sans assujétir la compagnie nouvelle au paiement de droits seigneuriaux ou féodaux.

50. Que l'acte d'accord énoncé dans la déclaration du demandeur, n'était en droit, de sa nature, que des conventions préparatoires d'une union qui n'était elle-même ni une vente, ni acte équipollent, ni translatif de propriété, et ne pouvait légalement établir, et n'a pas lui-même établi, comme corporation, la compagnie qui en est résultée.

60. Qu'au point de vue légal les défendeurs ne sont pas une corporation de main-morte, ni sujets aux restrictions des main-mortes, et ne possèdent pas les terres en question en main-morte, ainsi qu'il est dit en la déclaration du demandeur.

70. Que la Compagnie du Grand Tronc de Chemin de Fer actuellement existante, a été incorporée par la 18me Vic. ch. 33, lorsque l'acte seigneurial de 1854 était en force, et en vertu duquel tous les droits seigneuriaux ont été abolis, et qui a exempté les acquisitions des défendeurs de tous droits seigneuriaux.

80. Que les deniers réclamés en cette cause ne sont pas pour arrérages de redevances seigneuriales échues au demandeur antérieurement à la mise en force de l'acte seigneurial de 1854, et au recouvrement desquels il est pourvu par cet acte.

90. Qu'en supposant que les défendeurs fussent *gens de main-morte*, et eussent acquis les terres en question, ainsi qu'allégué, avant l'opération légale de l'acte seigneurial de 1854, la disposition déclaratoire de cet acte s'applique rétropectivement à telles acquisitions, et soustrait les défendeurs, comme *gens de main-morte*, à toute indemnité seigneuriale réclamée par le demandeur à cause de telle acquisition faite directement d'une autre corporation en main-morte.

100. That the undertaking of the Grand Trunk Railway of Canada is a work of public utility, including therein the realty acquired, and in question in this cause, and, therefore, not in law liable to the *lods et ventes* claimed by the plaintiff.

100. Que l'entreprise du Grand Tronc de Chemin de Fer du Canada est un ouvrage d'utilité publique, qui requièrait les terres acquises, et dont il est question en cette cause, et, conséquemment, ne peut être assujettie aux profits de vente réclamés par le demandeur.

*Kierzkowski vs The Grand Trunk Railway Company of Canada.* 3

#### MARRIAGE.—MINOR. COMMUNAUTÉ.

Held :—10. That a marriage contracted in the United States between two parties having their domicile in Lower Canada, though one of them (the wife) was a minor and had not the consent of her tutor, is valid in law, and that under such marriage, community of property is created.

20. That subsequent articles or covenants of marriage, executed in Lower Canada, with the consent and in the presence of the tutor, acting for and in the name of his ward, and stipulating *séparation de biens*, and followed by a marriage duly solemnized, can have no effect; and that such nullity may be opposed by the tutor himself, in an action *en reddition de compte* against him by the minor as separated as to property from her husband, who was personally indebted to the said tutor.

Jugé :—10. Qu'un mariage célébré aux États-Unis entre deux personnes ayant leur domicile dans le Bas-Canada, et dont l'une (la femme) était mineure et n'avait pas le consentement de son tuteur, est valable, et emporte communauté de biens.

20. Qu'un contrat de mariage subsequent, fait dans le Bas-Canada, du consentement et en la présence du tuteur, stipulant, pour sa mineure, séparation de biens, et suivi d'une célébration en face de l'église, ne peut avoir d'effet; et que cette nullité peut être invoquée par le tuteur lui-même, sur une action en reddition de compte portée contre lui par la mineure comme séparée de biens d'avec son mari, ce dernier étant débiteur personnel du dit tuteur.

*Languedoc et ux and Laviolette.*

257

#### *Priest.—Minor.*

Held :—That a priest who celebrates the marriage of a minor without the consent of her parents, is liable in damages to the parents whose authority has thus been disowned; and that such action is maintainable without a previous suit to set aside the marriage.

Jugé :—Que le prêtre qui marie une mineure sans le consentement de ses parents, est passible de dommages en faveur des parents dont on a méconnu l'autorité; et que telle action procède valablement sans au préalable avoir poursuivi la nullité du mariage.

*Larocque and Michon.*

222

#### MASTER OF SHIP.—PILOT.

Held :—That the master of a ship is not personally liable for damage done by his ship to the plaintiff's property, whilst sailing out of the harbor of Quebec under the manage-

Jugé :—Que le capitaine d'un vaisseau n'est pas personnellement responsable de dommage causé par son vaisseau à la propriété du demandeur, pendant que ce vaisseau

ment of a branch pilot, taken on board in obedience to the provisions of the 12th. Vict., cap. 114, sec. 53.

faisait voile du havre de Québec, en charge d'un pilot branché pris à bord en obéissance aux dispositions de la 12me. Vict., ch. 114, sec. 53.

*Lampson vs Smith.*

193

#### MILITARY EQUIPMENT.—SEIZURE.

Held :—That the sword of a military man is exempt from seizure, as being part of his necessary military equipment.

Jugé :—Que l'épée d'un militaire est exempt de saisie, comme formant partie nécessaire de ses accoutrements militaires.

*Wade vs. Hussey and Hussey.*

511

#### MINOR.—*Vide* MARRIAGE.

#### MORTGAGE.—REGISTRATION.

Held :—1o. That registration by memorial of an hypothecary claim founded upon a deed of donation, which does not state the amount of the claim, is inoperative as against a subsequent *bonâ fide* purchaser who has duly registered his deed of acquisition.

2o. That such memorial should contain the allegations necessary to disclose all the rights sought to be preserved by means thereof.

Jugé :—1o. Qu'un enregistrement par sommaire d'une réclamation hypothécaire fondée sur un acte de donation, qui n'annonce pas le montant réclamé, est nul, par rapport à un acquéreur subséquent de bonne foi qui a dûment enregistré son titre d'acquisition.

2o. Que tel sommaire doit contenir les matières nécessaires pour faire apparaître tous les droits que l'on veut conserver au moyen d'icelui.

*Fraser et ux vs. Poulin..*

349

#### Registry Laws.—Costs.

Held :—That costs of action, as accessory of the principal, rank before an hypothecary claim, registered subsequently to the obligation for the amount of which judgment has been rendered, but previously to the judgment condemning the defendant to the payment of costs.

Jugé :—Que des frais d'action, comme accessoire du principal, prennent une réclamation hypothécaire, enregistrée subséquentement à l'obligation sur laquelle le jugement a été rendu, mais antérieurement au jugement qui a condamné le défendeur au paiement de frais.

*Marchildon vs. Mooney.*

122

#### MUNICIPAL ELECTION.—CONTESTATION OF,

Robitaille, warden of the county of Quebec, had appointed himself to preside the municipal election of Charlesbourg, and on the day fixed, Glackemeyer, the senior Justice of the Peace, assuming that the nomination of Robitaille was illegal, had forcibly installed him-

Robitaille, préfet du comté de Québec, s'était nommé lui-même pour présider l'élection municipale de Charlesbourg, et au jour indiqué, Glackemeyer, le plus ancien Juge-de-Paix, prétendant que la nomination de Robitaille était illégale, s'était emparé de force de la prési-

self as president, and had proceeded with the election, assisted by a party who had expelled Robitaille from the polling place; Robitaille on his part had proceeded with an election in an adjoining room, without the presence of the majority of the electors, and after polling four votes, had declared his election closed by reason of violence:—

Held:—10. That Glackemeyer had no right to instal himself as president, even admitting the illegality of Robitaille's appointment, and that therefore the election presided over by him was void.

20. That the senior Justice of the Peace can only preside in the absence of the person appointed by the warden.

30. That the election presided over by Robitaille was void inasmuch as it had taken place in the absence of the majority of the electors assembled, and had been prematurely terminated after the polling had commenced.

*Paquet et al and Robitaille et al.*

Held:—10. That a municipal election is void, because the votes were taken upon loose sheets, and that in fact there was no poll book stating the purpose of the election, giving the names of the candidates, those of the electors, their additions and places of residence; and because the votes had been given without naming the candidates for whom such votes were so given, but merely by indicating the party in whose favor the votes were given.

20. That petitioners, in like cases, who pray to be declared duly elected in the place and stead of the respondents, are bound to allege and prove that they are duly qualified and eligible as municipal councillors.

*Guay et al and Blanchet et al.*

Held:—10. That the statute law of Lower Canada being silent upon the subject, "bribery" in municipal elections, has not the effect of

dence, et avait procédé à une élection, aidé d'un parti qui avait expulsé Robitaille de la chambre du poll; ce dernier avait de son côté procédé à une élection dans une pièce voisine, hors la présence de la majorité des électeurs, et après avoir enregistré quatre votes, avait déclaré son élection close à cause du trouble:—

Jugé:—10. Que Glackemeyer n'avait point droit de s'emparer de la présidence, quand bien même la nomination de Robitaille eut été illégale, et qu'en conséquence l'élection faite par lui était nulle.

20. Que le plus ancien Juge-de-Paix n'a droit de présider qu'en l'absence de la personne nommée par le préfet.

30. Que l'élection faite par Robitaille était nulle comme ayant été faite hors la présence de la majorité des électeurs assemblés, et après un commencement de votation terminée prématurément.

Jugé:—10. Qu'une élection municipale est nulle, parce que les votes ont été pris sur des feuilles volantes, et qu'il n'y avait véritablement pas de livre de poll énonçant l'objet de l'élection, les noms des candidats, ceux des électeurs, leurs domiciles et leurs qualités; et parce que l'on avait voté sans nommer les personnes en faveur desquelles l'on votait, mais seulement en indiquant le parti que l'on voulait soutenir.

20. Que les requérants, en pareils cas, qui demandent d'être déclarés dûment élus aux lieu et place des intimés, doivent alléguer et prouver qu'ils sont qualifiés et éligibles comme conseillers municipaux.

Jugé:—10. Que les lois du Bas-Canada ne statuant pas quant à la "corruption" en fait d'élections municipales, telle corruption n'a pas

annulling the votes of the persons bribed, nor of disqualifying the person by whom they were bribed.

20. That the respondent cannot, by means of a special answer, be called upon to answer charges not specified in the petition (*requête libellée*) filed under the 12th. Vic., ch. 41, sec. 3.

30. That the petitioner having prayed for a judgment upon the right of one Thomas McGreevy to the contested office of city councillor, the defendant had the right to raise an issue to try the right of the said McGreevy to hold the said office, and to shew that his claims were unfounded; the whole upon demurrer.

*Wood and Hearn.*

l'effet d'annuler les votes obtenus par ce moyen, ni de disqualifier la personne qui a obtenu tels votes.

20. Que l'intimé ne peut pas, au moyen d'une réponse spéciale, être contraint de répondre à des faits qui ne sont pas allégués dans la requête filée en vertu de la 12me. Vic., ch. 41, sec. 3.

30. Que le requérant ayant conclu à un jugement quant au droit d'un nommé Thomas McGreevy à l'office de conseiller municipal, le défendeur était en droit de révoquer en doute le droit du dit McGreevy de retenir le dit office, et de démontrer que ses prétentions étaient mal fondées; le tout au moyen d'une défense au fonds en droit.

332

#### NAVIGABLE RIVER, OBSTRUCTION TO.

Held:—That a superior mill owner has no right to obstruct a river which is *navigable et flottable* and used for floating timber, by constructing a boom across such river, and that parties owning mills lower down the river whose logs are detained by such boom have a right, after reasonable notice, to demand to be allowed to pass with their logs, to open the boom and allow their own logs to pass down the river, and are not responsible for the damages caused thereby to the person obstructing the river, by reason of his logs being carried down the stream.

Jugé:—Que le propriétaire d'un moulin supérieur n'a pas le droit d'obstruer une rivière navigable et flottable et dont on se sert pour descendre des billots, en barrant telle rivière avec un *beaume*, et que des individus propriétaires de moulins inférieurs, les billots desquels sont retenus par tel *beaume*, sont en droit, après avis raisonnable et demande faite pour permission de passer leurs billots, d'ouvrir tel *beaume* et d'y passer leurs billots pour descendre la rivière, et qu'ils ne sont pas responsables des dommages causés à la personne obstruant la rivière, les billots de telle personne ayant été emportés par le courant.

*Chapman vs Clark et al.*

147

#### NOTICE OF ENQUÊTE.—*Fide* ENQUÊTES.

OPPOSITION.—*Fide* DOMICIL, ELECTION OF.—RATIFICATION.

OPPOSITION AFIN DE CHARGE.—*Fide* RETRAIT CONVENTIONNEL.

PARTNER.—*Fide* EVIDENCE.



## PARTNERSHIP.—ASSIGNMENT.—FERRY.

Held :—That in a contract between several persons for the keeping of a ferry, with power to any one of them to sell or convey his right therein, the assignees of any one of the said parties cannot act so as to injure the business ; that the other copartners have a personal and direct action against such assignees, as well for the damages arising from their breach of the original contract, as for the rescission of the contract for the future.

Jugé :—Que dans un contrat entre plusieurs individus pour l'exploitation d'une traverse, avec liberté à chacun d'eux de vendre ou céder ses droits, il n'est pas loisible aux cessionnaires d'une des parties d'agir de manière à nuire à l'entreprise ; que les autres sociétaires avaient une action personnelle et directe contre ces cessionnaires, tant pour les dommages résultant de leur infraction du contrat primitif, que pour faire rescinder le contrat pour l'avenir.

*Lalouette dit Lebeau et al and Delisle et al.*

174

PARTNERSHIP.—*Vide* ACTION OF ACCOUNT.PARISH, NAME OF.—*Vide* EXCEPTION A LA FORME.

## PÉREMPTION D'INSTANCE.—COSTS.

Held :—That in a judgment declaring a suit lapsed, *périmée*, the Court may condemn the plaintiff to pay the costs incurred by the party obtaining such judgment.

Jugé :—Que sur jugement déclarant une instance périmée, le tribunal peut accorder les frais encourus par la partie défenderesse en la demande ainsi périmée.

*Gore et al and Gagy.*

454

PILOT.—*Vide* MASTER OF SHIP.

## PILOT.—SALVAGE.

Held :—1o. That a pilot in charge of a vessel is entitled to remuneration from the owner, in addition to the usual pilotage, for loss of time, and for services rendered in saving some of the spars and rigging of such vessel, carried away owing to the defective quality of the materials used.

Jugé :—1o. Qu'un pilote en charge d'un vaisseau a droit d'être rémunéré, outre le pilotage ordinaire, pour perte de temps et pour services rendus en sauvant des espars et une partie du grément du vaisseau, emportés en conséquence de la mauvaise qualité des matériaux employés.

2o. That where the owner of such vessel obtains indirectly the amount of such pilot's claim from the underwriters, the pilot will recover from the owner in an action for "work and labor, and loss of time," although there be no count in the declaration for money had and received.

2o. Que lorsque le propriétaire de tel vaisseau obtient indirectement des assureurs le montant de la réclamation du pilote, le pilote a droit de recouvrer tel montant dans une action pour "ouvrage et perte de temps," quoique la déclaration ne contienne aucun chef pour argent reçu.

*Russell vs Parke.*

229

## PLEADINGS.—ARTICULATION DE FAITS.

**Held:**—That an articulation of facts which contains matter not to be found in the pleadings, or matters admitted by such pleadings, is nevertheless good.

**Jugé:**—Qu'une articulation de faits qui contient des matières qui ne sont pas énoncées dans la déclaration ou dans les plaidoyers, ou des matières admises par tels plaidoyers, est valable.

*Rouleau vs Bacquet.*

154

*Foreclosure.*

**Held:**—That an application by defendants to enlarge the delay to plead, presented after *Acte* of foreclosure granted, cannot be entertained by a judge while the foreclosure subsists; and that notice of such application, served on the plaintiffs before the expiration of the delay to plead, does not suspend the plaintiffs' right to obtain such foreclosure.

**Jugé:**—Qu'une application par des défendeurs à l'effet que le délai pour plaider soit prolongé, faite après l'obtention d'un acte de foreclosure, ne peut être entretenue par un juge pendant que l'acte de foreclosure subsiste; et qu'un avis de telle application, signifié aux demandeurs avant l'expiration du délai pour plaider, ne suspend pas le droit des demandeurs d'obtenir telle foreclosure.

*Miller et al vs McDonald et al.*

303

*Slander.—Justification.*

**Held:**—That a plea to an action of damages for slander, which repeats and at the same time offers to retract the slanderous words complained of, will be held bad on demurrer.

**Jugé:**—Qu'un plaidoyer à une action en dommages pour injures verbales, par lequel l'on répète et en même temps l'on offre de retracter les paroles injurieuses dont on se plaint, sera renvoyé sur défense au fonds en droit.

**Query.**—Whether, by the law of Lower Canada, the truth of the slander complained of, even where its publication by the defendant is alleged to have been from good motives and for a justifiable end, can be pleaded in bar to an action for slander.

**Question.**—Savoir, si par le droit du Bas-Canada, la vérité des injures dont on se plaint, dans le cas même où il est allégué que les paroles injurieuses ont été proférées par de bons motifs et pour un objet justifiable, peut être la base d'une exception à une action pour injures.

*Noël, ès-qualités, vs. Chabot.*

211

*Will.—Donation.—Resiliation.*

The immoveable property seized was claimed by the opposant, as proprietor, in virtue of the will of her deceased husband, the plaintiff pleaded that subsequently to the date of the will, the testator and the opposant, by him duly authorised, had made donation of the property seized to the defendant; the oppo-

La propriété immobilière saisie fut réclamée par l'opposante, comme propriétaire, en vertu du testament de son défunt mari, et la demanderesse plaida que subséquemment à la date du testament, le testateur et l'opposante, de lui dûment autorisée, avaient fait donation de la propriété saisie au défendeur; l'op-

sant replied specially that the deed of donation was, subsequently, and before the death of her late husband, resiliated by consent of all parties thereto.

Held :—That such special answer was not demurrable on the ground that it invoked a different title from that alleged in the opposition; that, in fact, the opposant, by her special answer, did not invoke the resiliation as a title to the property, but that the object of the allegation was to show that in consequence of the resiliation in question, her title, under the will, had revived.

posante répliqua spécialement que la donation avait été, subséquemment, et avant le décès de son mari, résiliée du consentement de toutes les parties à icelle.

Jugé :—Que cette réponse spéciale ne pouvait être attaquée au moyen d'une défense aux fonds en droit, sur le principe que cette réponse invoquait un titre différent de celui allégué dans l'opposition; que, de fait, cette réponse n'invoquait pas cette résiliation comme titre, mais que l'objet de cet allégué était de faire voir qu'en conséquence de la résiliation en question, son titre, en vertu du testament, avait repris vigueur.

*Romain vs Dugal and Jobin.*

209

POSSESSION.—*Vide* ATTACHMENT.

POSSESSION WITHOUT A DEFINITE TITLE.—*Vide* ACTION  
POSSESSOIRE.

PRESCRIPTION.—LOYERS.

Held :—That arrears of house rent are subject to a prescription of five years.

*Sinjohn vs Ross and Christopherson.*

Jugé :—Que les loyers de maisons se prescrivent par cinq ans.

509

WAGES.

Held :—In an action brought against the representatives of a party deceased, within a year of his death, by the plaintiff, for eleven years wages, as *menagère* et *gouvernante*, accrued up to the time of the death; that the prescription under the 127th. article of the custom of Paris, even if the article were in force, is not applicable.

*Gloutency vs Lussier et al.*

Jugé :—Dans une action portée contre les représentants d'une personne décédée, dans l'an et jour du décès, pour onze années de gages échues à l'époque du décès de telle personne, réclamées par la demanderesse, comme *menagère* et *gouvernante*; que la prescription établie par l'article 127me. de la coutume de Paris, en supposant même que cet article fût en force, ne pourrait être invoquée.

295

Held :—That in an action for wages as purser of a steamer, the plea of prescription of six years under the 10th. and 11th. Vict., Cap. 11, is a good plea; and that no interruption of prescription is made out by proving that the defendant told the plaintiff that if any thing was found to be due him it would be paid.

*Strother vs Torrance.*

Jugé :—Que dans une action pour salaire par un commis, *purser*, sur un vapeur, le plaidoyer de prescription par six ans, en vertu de l'acte 10me et 11me Vict., chap. 11, est valable; et qu'il n'est établi aucune interruption de prescription en prouvant que le défendeur avait dit au demandeur que s'il était constaté qu'il lui était dû aucune somme il en serait payé.

3

PREScription.—*Vide* PROMISSORY NOTE.

PRIEST.—*Vide* MARRIAGE.

PRIMOGENITURE.—*Vide* BETTERMENTS, CLAIM FOR.

PRIVILEGE.—REVENDEICATION.—AFFIDAVIT, SERVICE OF.—  
DECLARATION.

Held :—10. That the vendor of goods sold on credit, *avec terme*, may revendicate the goods in the possession of the vendee who has become insolvent.

20. That the privilege exists although the goods have ceased to be *en totalité* in the hands of the vendee.

30. That an affidavit is not necessary to obtain a writ of *Saisie-Revendication* in such cases.

40. That service of the declaration may be made at the sheriff's office, under the 7th. Geo. IV, cap. 8.

Jugé :—10. Que le vendeur d'effets vendus à crédit et avec terme, peut les revendiquer en la possession de l'acheteur qui est devenu insolvable.

20. Que ce privilège existe quoique les effets aient cessé d'être en totalité dans les mains de l'acheteur.

30. Qu'un affidavit n'est pas nécessaire pour obtenir un writ de Saisie-Revendication en pareils cas.

40. Que service de la déclaration peut être fait au bureau du shérif, en vertu de la 7me. Geo. IV, chap. 8.

*Robertson et al vs Ferguson.*

239

PROMISSORY NOTE.—*Vide* CORPORATION.

PROMISSORY NOTE.—INDORSEMENT.

Held :—That a joint action brought against the maker of a note, by two persons to whom the same is made payable by indorsement signed by the payee, to whom, or order, the note was originally made payable, is good on demurrer, though it is not alleged in the declaration that the plaintiffs are copartners, or have the right to sue jointly.

Jugé :—Qu'une action peut être portée contre le faiseur d'un billet, par deux individus auxquels il a été transporté par endossement par celui à l'ordre duquel il était payable d'abord, et une défense au fonds en droit à telle action n'est pas soutenable, quoiqu'il ne soit pas allégué dans la déclaration que les demandeurs soient associés ou aient le droit de poursuivre conjointement.

*Stevenson et al vs Bisset*

191

*Prescription.*

Held :—That the prescription of five years, under the first part of the 31st. section of the 12th. Vict., ch. 22, applies to all notes due and payable previous to the passing of the said Statute.

Jugé :—Que la prescription de cinq ans, en vertu de la première partie de la 31me. section de la 12me. Vict., ch. 22, s'applique à tous billets dus et payables antérieurement à la passation du dit Statut.

*Côté et al vs Morrison.*

252

PROPRIETOR, LIABILITY OF FOR TRESPASS.—*Vide* TRESPASS.

RAILWAY COMPANY.—*Vide* MAIN-MORTE.

# RATIFICATION.—ACTION EN GARANTIE.—OPPOSITION.

Held:—That in cases of demand for ratification, the action *en garantie* lies to remove oppositions, unless an express stipulation to the contrary be inserted in the deed of sale.

Jugé:—Que dans les procédures pour jugement de ratification, l'action en garantie a lieu pour faire disparaître les oppositions, à moins que le contrat de vente ne contienne une stipulation expresse au contraire.

*Douglas and Dinning.*

501

# RÉCUSATION.—INIMITIE CAPITALE.—JUDGE.

Held:—1o. That the recusation contemplated by the ordinance of 1667, tit. 24, art. 23, can only be made in writing.

Jugé:—1o. Que la récusation, aux termes de l'ordonnance de 1667, titre 24, art. 23, ne peut être faite que par écrit.

2o. That the hatred (*inimitié capitale*) mentioned in the 8th. art. of the same title, to give rise to a recusation, must be hatred on the part of the judge, and must be so alleged and proved, failing which the reasons of recusation will be held impertinent.

2o. Que l'inimitié capitale mentionnée au 8e art. du même titre, pour pouvoir donner lieu à la récusation, doit être une inimitié de la part du juge, et ainsi alléguée et prouvée, sans quoi les moyens de récusations seront déclarés n'être pas pertinents.

3o. That the causes of such hatred so alleged as existing on the part of the judge, must be specifically declared.

3o. Que les causes de l'inimitié capitale alléguées comme provenant du chef du juge, doivent être particulièrement déclarées.

4o. That the hatred which gives rise to a recusation, must be a decided hatred, known, manifest, the result of the killing of some near relative of the person urging such recusation, or the result of differences, personal encounters, or matters of large interest between such person and the judge, which could create a feeling of revenge which might lead to using the opportunity of destroying the life, the honor or the personal advantages of an enemy.

4o. Que l'inimitié capitale qui donne lieu à la récusation, est une inimitié décidée, connue, manifestée, occasionnée par l'homicide de quelque proche de la partie faisant la récusation, par des querelles, des affaires d'honneur ou d'un gros intérêt, dont le ressentiment porterait à saisir les occasions d'attenter à la vie, à l'honneur ou aux avantages temporels de son ennemi.

*Renaud and Gagy.*

246

# REGISTRATION.—Vide COMPENSATION.—MORTGAGE.

# REMISE.—DONATION.

Held:—That in a contract in the nature of a *remise*, the consideration need not be expressed; and that with respect to such contracts the formalities required by law in relation to donations are not necessary, *à peine de nullité*.

Jugé:—Que dans un contrat, contenant une espèce de remise, il n'est pas nécessaire que la considération soit exprimée; et que par rapport à tel contrat les formalités de droit quant aux donations ne sont pas obligatoires, à peine de nullité.

*Robertson vs. Jones.*

364

REGISTRY OF VESSELS.—STEAMER.—REVENDEICATION.

Held :—1o. That a title to a steamer derived from a sale of the vessel and tackle, under warrant of distress issued by Justices of the Peace, under the Act 6th. Will. IV, c. 28, for the recovery of seamen's wages, is insufficient to maintain an action *en revendication*, the steamer not being shewn to belong to, or to have been registered in, Lower Canada.

2o. That the statute cannot be extended to vessels not belonging to, or registered in, Lower Canada.

3o. That where the statute authorizes the sale of a vessel or the tackle and apparel thereof, a warrant ordering the sale of the vessel *and* the tackle and apparel thereof, is illegal.

Jugé :—1o. Que le titre donné sur vente d'un vapeur et de ses agrès, en vertu d'un warrant émané par des Juges de Paix, en vertu de l'acte 6 Guil. IV, ch. 28, pour le recouvrement de gages de matelots, est insuffisant pour maintenir une action en revendication, attendu qu'il n'est pas constaté que le vapeur était du Bas-Canada, ou y avait été enregistré.

2o. Que l'opération du statut ne s'étend pas à des vaisseaux qui n'appartiennent pas au Bas-Canada, et qui n'y ont pas été enregistrés.

3o. Que dans les cas où un statut autorise la vente d'un vaisseau ou de ses agrès, un warrant qui ordonne la vente d'un vaisseau *et* de ses agrès, est illégal.

*Kerr vs. Gilderleeve.*

266

RESILIATION.—*Vide* PLEADINGS.

RETRAIT CONVENTIONNEL.—OPPOSITION AFIN DE CHARGE.

Held :—1o. That the abolition of the *retrait conventionnel* by the 18th. Vic. cap. 103, sec. 4, has no retroactive effect, and that the *retrait* may be exercised upon immoveables sold before the passing of the said act.

2o. That the advertisement of the sheriff, stating that the immoveables will be sold subject to the *cens et rentes* and other seigniorial and conventional charges and dues, according to the original titles of concession, is sufficient to preserve the *droit de retrait*, and that in such a case an opposition *afin de charge* was not required.

Jugé :—1o. Que l'abolition du *retrait conventionnel* par l'acte de la 18me Victoria chap. 103, sec. 4, n'a point d'effet rétroactif, et que le *retrait* peut s'exercer sur des immoveables aliénés avant la passation de cet acte.

2o. Que l'avertissement du shérif, portant que des immoveables seront vendus à la charge des *cens et rentes* et autres droits seigneuriaux et conventionnels, stipulés aux titres originaux de concession, est suffisant pour conserver le droit de *retrait*, sans qu'il soit besoin d'opposition *afin de charge*.

*Garon and Casgrain.*

397

REVENDEICATION.—*Vide* PRIVILEGE.—REGISTRY OF VESSELS.

SAISIE-ARRÊT.—*Vide* ATTACHMENT.

SAISIE-GAGERIE.—*Vide* EJECTMENT.

SALARY OF ASSESSORS.—*Vide* ASSESSORS.

SALVAGE.—*Vide* PILOT.

## SEAMEN'S WAGES.

**Held :—**That under the provisions of the merchant shipping act of 1854, a seaman who has contracted and signed articles for a voyage to British North America, and back to a final port of discharge in the United Kingdom, is not entitled to recover for wages here on the ground of apprehension of danger to life, in consequence of the unseaworthiness of the vessel.

*The Pilot.—Collins.*

Where a seaman shipped for a voyage, "from Shields to Barcelona, thence to any other port or ports in the Mediterranean, Black Sea, Sea of Azof, or any port or ports on the coast of Africa, West Indies, South America, United States, or British North America; —from thence to a port of final discharge in the United Kingdom or Continent of Europe. The voyage to terminate in the United Kingdom and not to exceed—;" and the ship went from Shields to Barcelona, and thence to Quebec to load for a final port of discharge in England:

**Held :—**1o. That no right of action accrued to such seaman for wages in Quebec, and that the Court had no jurisdiction in such action, under the provisions of the 17th. and 18th. Vic., c. 104, sec. 190,—the voyage, according to the contract, not terminating at Quebec.

2o. That it is not essentially necessary to insert the probable duration of the voyage in the mariner's contract.

*The British Tar.—Charleson.*

Where a seaman shipped for a "voyage from London to Sunderland, thence to Rio Janeiro and any ports in South or North America, West Indies, Cape of Good Hope, Indian or China seas, Australasia and back to a final port of discharge

**Jugé :—**Que sous les dispositions de l'acte de la marine marchande de 1854, un matelot qui s'est engagé et a signé un contrat par écrit pour un voyage à l'Amérique Britannique du Nord, et de retour à un port de décharge dans le Royaume-Uni, n'est pas en droit de recouvrer ses gages sous le prétexte que sa vie est en danger par la raison du mauvais état du vaisseau.

99

Un matelot s'engagea pour un voyage, "de Shields à Barcelone, et de là à aucun port ou ports dans la Méditerranée, la Mer Noire, la Mer d'Azof, ou aucun port ou ports du littoral d'Afrique, des Indes Occidentales, de l'Amérique du Sud, des Etats-Unis, ou de l'Amérique Britannique du Nord; —et de ces derniers endroits à un port de décharge dans le Royaume-Uni ou sur le continent d'Europe. Le voyage se terminant dans le Royaume-Uni et "n'excédant pas—." Le vaisseau se rendit de Shields à Barcelone, et de là à Québec, pour y prendre cargaison pour un port de décharge en Angleterre:

**Juge :—**1o. Que dans tel cas, tel matelot n'avait aucune action pour gages à Québec, et que la Cour n'avait aucune juridiction sous les dispositions des 17me. et 18me. Vic., chap. 104, sec. 190,—le voyage, aux termes du contrat, ne terminant pas à Québec.

2o. Qu'il n'est pas essentiellement nécessaire que la durée probable du voyage soit insérée dans l'engagement.

272

Dans le cas où un matelot s'était engagé pour un "voyage de Londres à Sunderland, de là à Rio-Janeiro et aucuns ports dans l'Amérique du Sud ou de l'Amérique du Nord, des Indes Occidentales, des mers de l'Inde ou de la Chine, de

in the United Kingdom or continent of Europe, between the Elbe and Brest, voyage not to exceed twelve months," and the ship went from London to Sunderland, thence to Rio-Janeiro, thence to the Cape of Good Hope, thence to St. Helena and the Island of Ascension, and thence to Quebec?—

Held:—1o. That the articles were bad as being vague and uncertain.

2o. That the voyage actually performed by the vessel in proceeding from the Cape of Good Hope across the Atlantic to the Island of Ascension, whence, instead of returning to a final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest, she recrossed the Atlantic and returned to the continent of America, was not a prosecution of the voyage described in the articles, and amounted, in effect, to a deviation, under the merchant shipping act of 1854, sec. 190,

*The Prince Edward,—Diaper.*

Held:—That an agreement entered into by the master of a vessel with his crew, subsequent to the execution of the mariner's contract, to discharge and pay them their wages at a port other than, and previous to the ship's arrival at, her final port of discharge, is not binding upon him.

*The "Winscales,—Innes.*

#### SEIZURE.—ADVERTISEMENT BY SHERIFF.

Held:—That in the case of the seizure of real estate, it is not necessary to mention in the *procès-verbal* and notices, the contents of the property seized, and that, in the case submitted, the respondent having sold the real estate in question without mentioning its contents, could not urge the absence thereof in the *procès-verbal*.

*Berthelet and Guy et al.*

l'Australasie et de retour à un port de décharge dans le Royaume Uni ou sur le continent d'Europe, entre l'Elbe et Brest, le voyage ne devant pas durer plus de douze mois," et le vaisseau s'étant rendu de Londres à Sunderland, de là à Rio-Janeiro, de cet endroit au Cap de Bonne Espérance, de là à St. Hélène et à l'Isle d'Ascension, et de ce dernier endroit à Québec:—

Jugé:—1o. Que le contrat étant vague et incertain était nul.

2o. Que le voyage fait par le vaisseau en traversant l'Atlantique du Cap de Bonne Espérance à l'Isle d'Ascension, d'où il avait traversé l'Atlantique de nouveau et était revenu au continent d'Amérique au lieu de retourner à un port de décharge dans le Royaume-Uni ou sur le continent d'Europe, entre l'Elbe et Brest, n'était pas poursuivre le voyage indiqué dans le contrat, mais était, de fait, une déviation de ce voyage, aux termes de l'acte de la marine marchande de 1854, sec. 190.

Jugé:—Qu'une convention entre le capitaine d'un vaisseau et son équipage, fait postérieurement à l'exécution du contrat entr'eux, par laquelle convention ce premier s'engage à les renvoyer et à leur payer leurs gages dans un port autre que celui indiqué comme le port de décharge, est nulle.

293

350

Jugé:—Qu'en matière de saisie immobilière, il n'est pas nécessaire de spécifier au *procès-verbal* de saisie et aux annonces, la *contenance* de l'immeuble saisi, et que, dans l'espèce, les intimés ayant vendu le terrain en question sans en donner la contenance, n'en pouvaient invoquer l'absence sur la saisie.

299



*Bailiff.*

Held :—That an opposition cannot be maintained on the ground that the bailiff making the seizure was not a sheriff's bailiff, the writ of execution having been delivered to him by the sheriff.

*Freleigh vs. Seymour.*

Jugé :—Qu'une opposition fondée sur ce que l'huissier faisant la saisie n'est pas un huissier du shérif, ne peut être maintenue, le writ d'execution ayant été remis à tel huissier par le shérif.

256

SEIZURE.—*Vide* ASSIGNMENT.—MILITARY EQUIPMENT.

SERVICE OF DECLARATION.—*Vide* PRIVILEGE.

## SERVITUDE.

Held :—That the action *négatoire* will not lie notwithstanding that the realty in favor of which the service of a *coupe de bois* was created has been enlarged, if it be not made to appear that such service has, in consequence, become more onerous.

*Blais and Simoneau et ux.*

Jugé :—Qu'il n'y a pas lieu à l'action *négatoire*, quoique l'héritage en faveur duquel une servitude de coupe de bois a été créée, ait été agerai di, s'il n'appert que la servitude soit, en conséquence, devenue plus onéreuse.

356

SET OFF.—*Vide* COMPENSATION.

SHIPPING ACT.—*Vide* REGISTRY OF VESSELS.

SLANDER.—*Vide* CRIMINAL INFORMATION.—PLEADINGS.

## SPECIAL BAIL.

Held :—That a motion for permission to put in special bail, after the expiration of eight days from the return day, which does not set forth special grounds in support thereof, cannot be received.

*Bégin et al vs Bell et al.*

Jugé :—Qu'une motion pour permission de donner cautionnement spécial, après l'expiration des huit jours ensuivant le rapport d'un writ, laquelle motion n'énonce aucune raison spéciale au soutien d'icelle, ne peut être reçue.

138

SQUATTER.—*Vide* BETTERMENTS, CLAIM FOR.

STEAMER.—*Vide* COMMON CARRIER.—REGISTRY OF VESSELS.

SUBSTITUTION.—LEGACY.—WILL.

On a bequest by a testator of real estate to his wife, during her natural life, and after her decease to the testator's son, George, during his natural life ; and after his decease, or if he and the wife of the testator should both have died before the testator, then to the eldest son of the body of the said George, lawfully begotten, and the heirs of the body

Dans l'espèce d'un legs fait par un testateur d'un immeuble à sa femme, en jouissance, sa vie durant, et à son décès à un fils du testateur, George, en jouissance sa vie durant ; et à la mort de celui-ci, ou au cas de son prédécès, et du prédécès de la femme du testateur, au fils aîné né ou à naître du dit George, et aux héritiers issus ou à naître

of such eldest son ; and *in default of such issue*, to the second, third, fourth and all and every other son and sons of the said George, one after another, by priority of birth, and to the children of such son ; the elder of such sons and his heirs always preferred to a younger son, and in default of such male issue, a similar bequest to the daughters :—

Held :—That the eldest son of George having survived him and the testator's wife, has taken the said bequest in full property without being charged with any *fidéicom-mis*, or trust, in favor either of his children, or of his brothers and sisters, who could have claimed the said bequest only in default of the said eldest son or his heirs.

*Platt and Charpentier.*

481

#### SUBSTITUTION OF ATTORNEY.—*DESAVEU.*

Held :—That, under the circumstances of the case, the substitution of an attorney for the appellant in lieu of the one who previously represented him, is an acquiescence of all the proceedings of the first attorney, there being no *désaveu*, and this notwithstanding any irregularity in the said proceedings.

*Burroughs and Molson et al.*

494

#### TENURES ACT.—*Vide* LAW OF ENGLAND.

#### TRESPASS, LIABILITY OF PROPRIETOR FOR.

Held :—That, in the case submitted, the appellant, a tenant of M., rightly brought his action against the respondent, a neighbouring proprietor, as and for *voie de fait* ; the latter having permitted rubbish to accumulate for a number of years against the partition wall between his property and that occupied by the appellant, and thereby caused the said wall to fall over on the premises occupied by the appellant.

*Gallagher and Allsopp.*

156

#### WAGES.—*Vide* PRESCRIPTION.

légitimement de ce fils aîné ; et à défaut de telle descendance, au second, troisième, quatrième et à tout autre fils et tous autres fils du dit George, l'un après l'autre suivant la priorité d'âge, et aux enfants respectifs de tel fils ; l'aîné et ses enfants étant toujours préférés à un frère plus jeune, et à défaut d'enfants mâles semblable disposition en faveur des filles.

Jugé :—Que le fils aîné de George ayant survécu ce dernier et la femme du testateur, a recueilli le legs en toute propriété sans charge de fidéicommiss, soit envers ses enfants, soit envers ses frères et sœurs, qui n'étaient appelés à recueillir que conditionnellement, au cas où lui, fils aîné, n'aurait pas recueilli.

Jugé :—Que, dans l'espèce, la substitution d'un procureur pour l'appellant au lieu et place de celui qui le représentait avant, a eu l'effet d'un acquiescement aux procédés du premier procureur, faute d'un désaveu, et ce nonobstant les irrégularités qui pouvaient se rencontrer dans ces procédés.

Jugé :—Que, dans l'espèce, l'appellant, locataire de M., était en droit de porter une action pour voie de fait contre l'intimé, propriétaire voisin des lieux occupés par l'appellant ; l'intimé ayant depuis plusieurs années permis l'accumulation de décombres contre le mur de séparation entre sa propriété et celle occupée par l'appellant, cette accumulation ayant causé la chute du mur sur les lieux occupés par l'appellant.

## WAREHOUSEMAN, LIABILITY OF.—DELIVERY.

Held :—1o. That a paid warehouseman (*dépositaire salarié*) is liable for want of due care respecting goods placed in his store.

2o. That if such warehouseman plead that his store was broken into, and the goods so confided to his charge, as such *dépositaire*, were stolen and taken away therefrom, the *onus* of proof rests with him, and he must prove the robbery.

3o. That a written order by the seller of goods, directing those in whose care the goods are, to deliver the same to the buyer, amounts, in law, to a good and valid delivery of such goods.

*Fraser et al vs Roche.*

Jugé :—1o. Qu'un dépositaire salarié de marchandises confiées à sa garde, est responsable de la faute légère.

2o. Que si tel dépositaire plaide que son magasin a été enfoncé, et que les marchandises ainsi confiées à sa garde, comme tel dépositaire, en ont été volées et emportées, l'*onus probandi* incombera sur lui, et il sera tenu de prouver le vol.

3o. Qu'un ordre écrit par le vendeur de marchandises, enjoignant au dépositaire d'icelles d'en faire la livraison à l'acheteur, est, en loi, une livraison bonne et valable de telles marchandises.

288

## WATER POWER.—DAM.

Held :—That when two proprietors upon the same stream possess water powers of which one cannot be improved without the destruction of the other, the first occupant must have the preference and is entitled to have an abatement of the dam of the other.

Jugé :—Que quand deux propriétaires possèdent sur le même cours d'eau des places de moulins, sur lesquelles l'on ne peut construire des moulins sans que l'un ne fasse tort à l'autre, le premier occupant doit avoir la préférence et le droit de demander que l'autre soit contraint à démolir sa chaussée.

*Dunkerley vs McCarty.*

132

WILL.—*Vide* LEGITIME.—PLEADINGS.—SUBSTITUTION.WITNESS.—*Vide* CORPORATION.—ASSESSORS.

## WRITTEN PROMISE.—EVIDENCE.

It was decided in the Court of Queen's Bench, appeal side, 1o. that, in an action for the recovery of a sum of money, promised to a certain person, by an instrument in writing, in the event of such person marrying another person named, the defence being the general issue, it was sufficient for the plaintiff, who was in possession of the instrument, to obtain judgment, to prove that the signature was authentic. 2o. That, in the case submitted, the two witnesses examined on behalf of the plaintiff were neither allied or of kin to the parties so as to render them

Il fut décidé dans la Cour du Banc de la Reine, en appel. 1o. Que, dans une action pour recouvrer une somme de deniers promise à une personne par un écrit sous seing privé, dans le cas où telle personne épouserait une personne indiquée, la défense étant une dénégation générale, il était suffisant pour la demanderesse, en possession de cette écrit, pour obtenir jugement, de prouver la signature au bas de tel document; 2o. Que, dans l'espèce, les deux témoins entendus de la part de la demanderesse n'étaient ni parents ni alliés des parties, de ma-

incompetent as such witnesses: This decision having been submitted by appeal to the Lords of the Judicial Committee of the Privy Council, it was there:

Held:—That in the circumstances of the case it was incumbent upon the party plaintiff to prove all the facts alleged by such party, to enable her to obtain her demand, namely, the signing of the instrument, the delivery of the same to the plaintiff either by the party signing it or with his consent, and the accomplishment of the condition precedent.

*McCarthy and Judah.*

nière à être témoins incompétents. Cette décision ayant été soumise par appel aux Lords du Comité Judiciaire du conseil privé de Sa Majesté, il a été:

Jugé:—Que dans les circonstances de la cause il incombait à la demanderesse de prouver tous les faits par elle allégués, pour soutenir sa demande, notamment, la signature au bas de l'écrit, la livraison d'icelui par le signataire ou par quelqu'un de son consentement, et l'accomplissement de la condition qui devait précéder le paiement de la somme promise.

369

# TABLE OF CONTENTS

OF THE

## INDEX.

	PAGES.
Action of account.—Partnership.....	513
Action en garantie.— <i>Vide</i> Ratification.....	534
Action possessoire.—Possession without a definite title.....	513
Advertisement by sheriff.— <i>Vide</i> Seizure.....	537
Affidavit.— <i>Vide</i> Attachment.....	515
Agent, Liability of.— <i>Vide</i> Attachment.....	515
Articulation de faits.— <i>Vide</i> Pleadings.....	531
Assessors, action of.—Salary.—Corporation.—Witness.....	514
Assignment.—Fraud.—Insolvency.....	514
Assignment.— <i>Vide</i> Insurance, contract of.—Partnership.....	522, 530
Attachment.—Agent, liability of.....	515
Bail.— <i>Vide</i> Special bail.....	538
Bailiff.— <i>Vide</i> Seizure.....	538
Betterments, claim for.—Squatters, Primogeniture, Common soc- cage.....	516
Bornage.....	516
Building Societies.—Corporations, Legal existence of.....	516
Certiorari.— <i>Vide</i> Conviction.....	517
Common Carrier.—Steamer.....	517
Common soccage.— <i>Vide</i> Betterments, claim for.....	516
Communauté.— <i>Vide</i> Marriage.....	526
Compensation.—Indication de paiement.—Registration.....	517
Conviction.—Certiorari.....	517
Costs — <i>Vide</i> Mortgage.—Péremption d'instance.....	527, 530
Corporation.— <i>Vide</i> Assessors.....	514
Corporations, Legal existence of.— <i>Vide</i> Building Societies.....	516
Corporation, liability of.—Damages.....	518
Corporation of Montreal.— <i>Vide</i> Expropriation, proceedings for...	521
Criminal Information.—Slander.....	518
Dam.— <i>Vide</i> Water Power.....	540
Damages.— <i>Vide</i> Corporation, liability of.....	518
Déguerpissement.....	519
Delivery.....	519
Désaveu.— <i>Vide</i> Substitution of Attorney.....	539
Domicil, Election of.—Opposition.....	519
Donation.— <i>Vide</i> Légitime.—Pleadings.—Remise.....	524, 531,
Dower.— <i>Vide</i> Laws of England.....	523
Ejectment.—Saisie-Gagerie.....	520
Emphytéote.....	520

Enquêtes, Notice of Enquête.—Judgment.....	520
Evidence.—Partner. . . . .	520
Evidence.— <i>Vide</i> Insurance, Contract of.—Written promise. . . . .	522, 540
Exception à la forme.—Parish, name of . . . . .	521
Expropriation, proceedings for.—Verdict.—Corporation of Montreal . . . . .	521
Ferry.— <i>Vide</i> Partnership. . . . .	530
Free and Common Soccage.— <i>Vide</i> Laws of England. . . . .	523
Foreclosure.— <i>Vide</i> Pleadings. . . . .	531
Fraud.— <i>Vide</i> Assignment. . . . .	514
Habeas Corpus . . . . .	522
Indication de paiement.— <i>Vide</i> Compensation. . . . .	517
Indorsement.— <i>Vide</i> Promissory note. . . . .	533
Informers.— <i>Vide</i> Attachment. . . . .	515
Inimitié Capitale.— <i>Vide</i> Recusation. . . . .	534
Insolvency.— <i>Vide</i> Assignment. . . . .	514
Insurance, Contract of.—Evidence.—Assignment. . . . .	522
Judge.— <i>Vide</i> Recusation. . . . .	534
Judgment.— <i>Vide</i> Enquêtes . . . . .	520
Jurisdiction. . . . .	523
Justification.— <i>Vide</i> Pleadings . . . . .	531
Laws of England.—Tenures' Act.—Dower.—Free and Common Soccage. . . . .	523
Legacy.— <i>Vide</i> Substitution . . . . .	538
Légitime.—Donateur. Will. . . . .	524
Letters Patent. . . . .	524
Libel.— <i>Vide</i> Criminal information. . . . .	518
Lods et ventes.— <i>Vide</i> Mainmorte. . . . .	524
Loyers.— <i>Vide</i> Prescription. . . . .	532
Mainmorte.—Railway Companies.—Lods et ventes. . . . .	524
Marriage.—Minor.—Communauté. . . . .	526
Master of ship.—Pilot. . . . .	526
Military equipment.—Seizure. . . . .	527
Minor.— <i>Vide</i> Marriage. . . . .	526
Mortgage.—Registration. . . . .	527
Municipal Election, Contestation of. . . . .	527
Navigable River, Obstruction to. . . . .	529
Notice of Enquête.— <i>Vide</i> Enquêtes. . . . .	520
Opposition.— <i>Vide</i> Domicil, Election of.—Ratification. . . . .	519, 531
Opposition afin de charge.— <i>Vide</i> Retrait conventionnel. . . . .	535
Partner.— <i>Vide</i> Evidence. . . . .	520
Partnership.—Assignment.—Ferry . . . . .	530
Partnership.— <i>Vide</i> Action of account. . . . .	513
Parish, name of.— <i>Vide</i> Exception à la forme. . . . .	521
Péremption d'Instance.—Costs. . . . .	530
Pilot.— <i>Vide</i> Master of ship . . . . .	526
Pilot.—Salvage . . . . .	530
Pleadings.—Articulation de faits. . . . .	531
Possession.— <i>Vide</i> Attachment. . . . .	515
Possession without a definite title.— <i>Vide</i> Action possessoire. . . . .	513
Prescription.—Loyers. . . . .	532
Prescription.— <i>Vide</i> Promissory Note. . . . .	533
Priest.— <i>Vide</i> Marriage . . . . .	526
Primogeniture.— <i>Vide</i> Betterments, claim for . . . . .	516
Privilege.—Revendication.—Affidavit.—Service of Declaration. . . . .	533

Promissory note.— <i>Vide</i> Corporation.....	518
Promissory note.—Indorsement.....	533
Proprietor, liability of, for trespass.— <i>Vide</i> Trespass.....	539
Railway Company.— <i>Vide</i> Mainmorte.....	524
Ratification.—Action en garantie.—Opposition.....	534
Recusation.—Inimitié Capitale.—Judge.....	534
Registration.— <i>Vide</i> Compensation.—Mortgage.....	517, 527
Remise.—Donation.....	534
Registry of vessels.—Steamer.—Revendication.....	535
Resiliation.— <i>Vide</i> Pleadings.....	531
Retrait conventionnel.—Opposition à fin de charge.....	535
Revendication.— <i>Vide</i> Privilege.—Registry of vessels.....	533, 535
Saisie-Arêt.— <i>Vide</i> Attachment.....	515
Saisie-Gagerie.— <i>Vide</i> Ejectment.....	520
Salary of Assessors.— <i>Vide</i> Assessors.....	514
Salvage.— <i>Vide</i> Pilot.....	530
Seamen's Wages.....	536
Seizure.—Advertisement by sheriff.....	537
Seizure.— <i>Vide</i> Assignment.—Military equipment.....	514, 527
Service of declaration.— <i>Vide</i> Privilege.....	533
Servitude.....	533
Set off.— <i>Vide</i> Compensation.....	517
Shipping Act.— <i>Vide</i> Registry of vessels.....	535
Slander.— <i>Vide</i> Criminal Information, Pleadings.....	518, 531
Special Bail.....	536
Squatter.— <i>Vide</i> Betterments, claim for.....	516
Steamer.— <i>Vide</i> Common Carrier.—Registry of vessels.....	517, 535
Substitution.—Legacy.—Will.....	538
Substitution of Attorney.—Désaveu.....	539
Tenures' Act.— <i>Vide</i> Laws of England.....	523
Trespass, Liability of proprietor for.....	539
Wages.— <i>Vide</i> Prescription.....	532
Warehouseman, Liability of.—Delivery.....	540
Water power.—Dam.....	540
Will.— <i>Vide</i> Légitime.—Pleadings.—Substitution.....	524, 531, 538
Witness.— <i>Vide</i> Assessors.....	514
Written Promise.—Evidence.....	540

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# TABLE DES MATIÈRES CONTENUES

DANS

## L'INDEX.

	PAGES.
Accoutrements militaires	<i>Vide</i> Military Equipment..... 527
Acte des Tenures	" Laws of England..... 523
Acte, marine marchande	" Registry of vessels..... 535
Action en garantie	" Ratification..... 534
Action en reddition de compte	" Action of Account..... 513
Action possessoire	" Action possessoire..... 513
Affidavit	" Attachment..... 515
Agent, responsabilité de	" Attachment..... 515
Améliorations	" Betterments..... 516
Articulation de Faits	" Pleadings..... 531
Associé	" Evidence..... 520
Assurance	" Insurance..... 522
Avertissement par shérif	" Seizure..... 537
Avis d'enquête	" Enquêtes..... 520
Billet promissoire	" Promissory note..... 533
Bornage	" Bornage..... 516
Capitaine de vaisseau	" Master of ship..... 526
Cautionnement	" Special Bail..... 538
Certiorari	" Conviction..... 517
Chaussée	" Water Power..... 540
Commissionnaire	" Common Carrier..... 517
Commun socage	" Betterments..... 516
Communauté	" Marriage..... 526
Compagnie de Chemin de Fer	" Mainmorte..... 524
Compensation	" Compensation..... 517
Corporation	" Assessors, Corporation.... 514, 518
Corporation de Montréal	" Expropriation, proceedings for. 521
Corporations, existence de	" Building Societies..... 516
Cotiseurs	" Assessors..... 514
Déguerpissement	" Déguerpissement..... 519
Délateur	" Attachment..... 515
Désaveu	" Substitution of attorney..... 539
Domicile	" Domicil..... 519
Dommages	" Corporation..... 518
Donation	" Légitime..... 524
Douaire	" Laws of England..... 523
Election municipale	" Municipal election..... 527
Emphytéote	" Emphytéote.....



Endossement	<i>Vide</i> Promissory note.....	533
Enquêtes	" Enquêtes.....	520
Enregistrement	" Compensation.....	517
Enregistrement de vaisseaux	" Registry of vessels.....	535
Exception à la forme	" Exception à la forme.....	521
Expropriation	" Expropriation.....	521
Expulsion	" Ejectment.....	520
Forclusion	" Pleadings.....	531
Frais	" Mortgage.....	527
Franc et commun socage	" Laws of England.....	523
Fraude	" Assignment.....	514
Gages	" Prescription.....	532
Gages de matelots	" Seamen's wages.....	536
Garde-magasin	" Warehouseman.....	540
Habeas Corpus	" Habeas Corpus.....	522
Huissier	" Seizure.....	536
Hypothèque	" Mortgage.....	527
Indication de paiement	" Compensation.....	517
Information	" Criminal Information.....	518
Inimitié capitale	" Recusation.....	534
Injures	" Criminal information.....	518
Insolvabilité	" Assignment.....	514
Juge	" Recusation.....	534
Jugement	" Enquêtes.....	520
Jurisdiction	" Jurisdiction.....	523
Justification	" Pleadings.....	531
Légitime	" Légitime.....	524
Legs	" Substitution.....	536
Lettres patentes	" Letters Patent.....	524
Libelle	" Criminal information.....	518
Livraison	" Delivery.....	519
Lods et ventes	" Mainmorte.....	524
Lois anglaises	" Laws of England.....	523
Loyers	" Prescription.....	532
Mainmorte	" Mainmorte.....	524
Mariage	" Marriage.....	526
Mineure	" Marriage.....	526
Opposition	" Domicil.....	519
Opposition afin de charge	" Retrait conventionnel.....	535
Paroisse, nom de	" Exception à la forme.....	521
Peremption d'instance	" Péremption d'instance.....	530
Pilot	" Master of ship, Pilot.....	526 530
Pouvoir d'eau	" Water power.....	540
Possession	" Action possessoire.....	513
Prescription	" Prescription, Promissory note.....	532, 533
Prêtre	" Marriage.....	526
Primogéniture	" Betterments.....	516
Privilege	" Privilege.....	533
Procédure	" Pleadings.....	531
Promesse par écrit	" Written promise.....	540
Propriétaire	" Trespass.....	539
Ratification	" Ratification.....	534
Récusation	" Recusation.....	534
Remise	" Remise.....	534
Résiliation	" Pleadings.....	531

Retrait conventionnel  
 Revendication  
 Rivière Navigable  
 Saisie  
 Saisie  
 Saisie-arrest  
 Saisie-gagerie  
 Salaire de cotiseurs  
 Sauvetage  
 Service de déclaration  
 Servitude  
 Société  
 Société de construction  
 Squatter  
 Substitution  
 Substitution de Procureur  
 Témoin  
 Témoignage  
 Testament  
 Transport  
 Transport  
 Traverse  
 Vapeur  
 Voie de fait

<i>Vide</i> Retrait conventionnel.....	535
" Privilège.....	533
" Navigable River.....	529
" Assignment.....	514
" Attachment, Seizure.....	515 537
" Attachment.....	515
" Ejectment.....	520
" Assessors.....	514
" Pilot.....	530
" Privilege.....	533
" Servitude.....	538
" Action of account, Partner- ship.....	513 530
" Building societies.....	516
" Betterments.....	516
" Substitution.....	538
" Substitution of attorney.....	539
" Assessors.....	514
" Evidence, Insurance.....	520 522
" Légitime.....	540
" Assignment.....	514
" Insurance, contract of.....	522
" Partnership.....	530
" Common carrier.....	517
" Trespass.....	539











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